Supreme Court, U.S.
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IN THE

Supreme Court of the United States

BRIAN JONES,

Petitioner,

-v-

JOHN KEANE, SUPERINTENDENT, WOODBOURNE CORRECTIONAL FACILITY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

ROBERT N. ISSEKS, ESQ.
Counsel of Record
ALEX SMITH, ESQ.
Attorneys for Petitioner
6 North Street
Middletown, NY 10940
(845) 344-4322

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QUESTION PRESENTED

Did Petitioner's state court claim that his murder conviction was not supported by legally sufficient evidence fairly present, for purposes of exhaustion under 28 U.S.C.A. §2254(b)(1)(A), his constitutional challenge to New York's statutory distinction between "depraved indifference" murder and reckless manslaughter?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The District Court's opinion (Hon. Charles L. Brieant, USDJ) dated May 22, 2002, granting the petition for a writ of habeas corpus is annexed as Appendix A. The Second Circuit Court of Appeals' opinion (Hon. Barrington D. Parker, Jr., USCJ) dated May 13, 2003, reversing the Judgment of the District Court is published at 329 F.3d 290 (2nd Cir 2003) and is annexed as Appendix B.

STATEMENT OF JURISDICTION

The Court of Appeals entered its Judgment on May 13, 2003. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C.A. § 2254(b)(1)(A), which provides: "An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State . . ."

N.Y.S. Penal Law § 125.15(1), which provides that a person is guilty of manslaughter in the second degree when "[h]e recklessly causes the death of another person".

N.Y.S. Penal Law § 125.25(2), which provides that a person is guilty of murder in the second degree when: "[u]nder circumstances evincing a depraved indifference to human life,

he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person".

STATEMENT OF THE CASE

Procedural History

Petitioner, Brian Jones ("Petitioner") was convicted in the County Court, County of Orange, State of New York, after a jury trial of Murder in the Second Degree, and Criminal Possession of a Weapon in the Second and Third Degrees. He was sentenced on December 20, 1996, as a juvenile to indeterminate sentences of 9 years to life on the murder charge, 2 to 6 years on the second degree weapons possession charge, and 1 to 3 years on the third degree weapons possession charge, all sentences ordered to run concurrently. His conviction was affirmed by the Supreme Court of the State of New York, Appellate Division, Second Department, in a Decision dated November 1, 1999. *People v Jones,* 266 AD2d 236 (2nd Dept. 1999) Leave to appeal was denied by the New York Court of Appeals on May 24, 2000. *People v Jones,* 95 NY2d 798 (2000)[1]

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[1] On July 31, 2001, Petitioner filed a motion to vacate the judgment of conviction based upon his claim of ineffective assistance of trial counsel. By Decision of the County Court dated October 9, 2001, the motion was denied. On July 30, 2001, Petitioner filed an application for a writ of error *coram nobis* with the Appellate Division, Second Department, based upon his claim of ineffective assistance of appellate counsel. By Decision and Order of the Appellate Division dated November 5, 2001, the application was denied. On December 6, 2001, Petitioner filed an application for leave to appeal to the Appellate Division from the denial of his C.P.L. 440.10 motion. That application was denied by Decision and Order of the Appellate Division dated February 20, 2002.

On March 6, 2002, Petitioner filed a petition for a writ of *habeas corpus* challenging his conviction which was granted on May 22, 2002, by the United States District Court for the Southern District of New York (Judge Charles L. Brieant). *Jones v Keane,* S.D.N.Y. Civil Docket No. 02 CV 1804 (CLB).[2]

By Opinion dated May 13, 2003, the United States Court of Appeals for the Second Circuit held that Petitioner failed to exhaust his federal constitutional claim in the state courts and therefore reversed the Decision of the District Court and dismissed the petition for a writ of habeas corpus. *Jones v Keane*, 329 F.3d 290, 296 (2nd Cir 2003).

The Trial Court Proceedings

The evidence viewed most favorably to the prosecution shows that on a few days prior to June 17, 1996, the victim, Germaine Fields told Petitioner's 16 year old girlfriend, LaToya Williams, who was then pregnant with Petitioner's child, that he, Fields, was going to stab Petitioner "in the stomach and push it down inside and mess up his insides". On June 17th, at about 11:00 p.m., Williams was on the street 3 or 4 doors from her house, talking to Petitioner, when Fields came up to them "in a violent mood" cursing in Petitioner's face. Petitioner was just standing there, Fields' arms were up in the air, and Williams' father, John Smith, told Fields to leave them alone. Fields yelled at Smith, threatened Petitioner, and probably struck Petitioner.

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[2] The District Court directed that "[t]he writ shall issue unless the prosecution within thirty (30) days resentences Petitioner for Manslaughter in the Second Degree. The Clerk shall file a final judgment to that effect which shall provide that its operation is stayed pending appellate finality." *Jones,* at 12.

Smith tried to talk to Fields, but Fields jumped and yelled at Smith, as if wanting a fight. Fields then turned to argue with Petitioner in a hostile manner. Smith took Petitioner down the street and Williams moved Fields away. Fields tried to get to Petitioner and, while he, Fields, and Williams were entangled in a struggle, they fell hard to the cement sidewalk. Petitioner, who had been heeding Smith, was moving toward Smith's porch. When Williams and Fields went to the ground, Petitioner ran around a van, and, from a distance of about two feet, pointed a gun downward at Fields who was lying on his back. Petitioner then fired two shots that struck Fields in the neck and killed him. Petitioner fled the scene and checked into a motel under a false name. He was arrested at the motel the next morning.

Petitioner testified that he met Fields about 4 weeks prior to the shooting. Fields told Petitioner that he was a member of a gang called the Crips. On June 10th, Petitioner observed Fields with a gun. On June 14th, Williams told Petitioner that Fields had said he was going to kill Petitioner: "She said he's going to stab me in my stomach since I was really skinny. He knew how to kill people with knives."

At the scene of the shooting, according to Petitioner, Fields was yelling and cursing at Petitioner, face to face, and bumped his chest. Fields seemed high and was saying, "What the fuck are you doing with Peach. Get out of here before I kill you. I want to hurt you. You better leave." Fields kept yelling for Petitioner to leave or he would get killed, and trying to grab Petitioner, when Smith ran up and told Fields to leave them alone, whereupon Fields ran up to Smith and started yelling in his face, Petitioner told Fields to leave Smith alone, and Fields "jumped back in [Petitioner's] face." Fields then tried to grab Petitioner, but Williams grabbed Fields, and Smith grabbed Petitioner. Petitioner walked with Smith, but with his back turned, watching Fields and Williams. Fields grabbed Williams, was yelling at her, and threw her against a wall; Fields tried to

run toward Petitioner, but Williams pulled him back. When Fields threw Williams to the ground, Smith let go of Petitioner, and Petitioner ran over to Williams and tried to pick her up off the ground, "but it looked like she was unconscious, like she blacked out . . . she wouldn't get up." Fields was holding onto Williams and "wouldn't let go". Fields "started reaching, put his hand inside his pocket . . . looked like he had some kind of object in his pocket because his pocket was like bulging out like it could have had a weapon in it." Petitioner thought he had a gun: Fields was "reaching really quick and still had a hold of LaToya, and as soon as he put his hand in his pocket, I put out my gun . . . and fired a shot."[3] He fired twice, aiming at Field's shoulder: "I wasn't trying to kill him, I just wanted to hurt him so he wouldn't kill LaToya or me."

At the conclusion of the People's case as well as at the conclusion of the proof at trial, defense counsel moved to dismiss the charges[4] pursuant to N.Y.S. Criminal Procedure Law CPL §290.10 on the ground that the evidence adduced was legally insufficient. Both motions were denied.

After about 11 hours of deliberation, including readbacks, the jury acquitted Petitioner of intentional murder, but found him guilty of depraved indifference murder and of both weapons possession counts. Petitioner received the maximum sentence for a juvenile offender, 9 years to life, with lesser concurrent sentences on the weapons possession convictions.

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[3] These events happened "really fast"; Petitioner was scared that Fields was going to kill him or LaToya, and he was especially concerned that LaToya was then unconscious. At this point, Smith was about 8½ feet away – a pole could have blocked his view of the shooting; although there was a street light, it was "dim".

[4] With the exception of Criminal Possession of a Weapon in the Third Degree.

Petitioner's Constitutional Challenge

New York State Penal Law § 15.00(6) provides that the term "culpable mental state" means "intentionally" or "knowingly" or "recklessly" or with "criminal negligence" as these terms are defined in N.Y.S. Penal Law § 15.05. The term "recklessly" is defined under N.Y.S. Penal Law § 15.05(3) as follows:

> A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation. A person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts recklessly with respect thereto.

N.Y.S. Penal Law § 125.15(1) provides that a person is guilty of manslaughter in the second degree when "[h]e recklessly causes the death of another person". N.Y.S. Penal Law § 125.25(2) provides that a person is guilty of murder in the second degree when: "[u]nder circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person".

Petitioner claimed in his petition for a writ of habeas corpus that the history of the New York Court of Appeals' efforts to interpret the term "depraved indifference" is both confused and contradictory and that a review of these efforts shows that there is no principled basis upon which to distinguish depraved indifference murder and reckless manslaughter. Petitioner

argued that a term which was once reserved for the most heinous, but unintentional conduct, "depraved indifference" has been rendered so vague that it can be applied by prosecutors to any reckless homicide.

In one of its earlier cases, *People v Poplis*, 30 NY2d 85, 87 (1972), the New York Court of Appeals held that repeated "brutal, callous and inhuman" beatings which were inflicted by defendant on the 3 ½ year old child of his wife and which resulted in injuries producing death fit within the accepted understanding of the kind of recklessness involving a depraved indifference to human life as was required for conviction under the murder statute. The Court explained that "[t]he continued brutality toward a child . . . fits within the accepted understanding of the kind of recklessness involving 'a depraved indifference to human life'." *Poplis*, 30 NY2d at 88.[5]

According to the *Poplis* Court, "depraved indifference" was a concept reflective of the mens rea element of the crime, elevating it from the mere "recklessness" of manslaughter to the "depravity and utter recklessness" of something more serious and deserving of the same punishment as murder.

Later, in *People v Register*, 60 NY2d 270 (1983), the New York Court of Appeals stated that to bring a defendant's conduct within the depraved mind murder statute, the People are required to establish that the defendant's act was imminently

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[5] The *Poplis* Court cited *People v Jernatowski*, 238 NY 188 (1924) where the Court upheld a jury finding that the defendant's firing two or more shots into a house where he knew there were human beings, killing one of the occupants, "evinced a wicked and depraved mind, regardless of human life, and which amply supplied the evidence of malice and felonious intent". *Poplis*, 30 NY2d at 88. The Court in *Poplis* also referred to *Darry v People*, 10 NY 120, which construed the statutory language to include "circumstances evincing great depravity and utter recklessness in regard to human life". *Poplis*, 30 NY2d at 89.

dangerous, presented a very high risk of death to others and was committed under circumstances which evidenced a wanton indifference to human life or a depravity of mind. Rejecting the defendant's contention that the trial court erred in refusing to charge the jury that it could consider defendant's intoxication in determining whether he acted "[u]nder circumstances evincing a depraved indifference to human life", the *Register* Court held that this statutory phrase refers neither to the *actus reus* nor the mens rea of the crime, but, to the factual setting in which the crime occurs:

> Depraved mind murder resembles manslaughter in the second degree (a reckless killing which includes the requirement that defendant disregard a substantial risk [Penal Law, § 125.15, subd. 1; § 15.05, subd. 3]), but the depraved mind murder statute requires in addition not only that the conduct which results in death present a grave risk of death but that it also occur "[u]nder circumstances evincing a depraved indifference to human life." This additional requirement refers to neither the *mens rea* nor the *actus reus*. If it states an element of the crime at all, it is not an element in the traditional sense but rather a definition of the factual setting in which the risk creating conduct must occur – objective circumstances which are not subject to being negatived by evidence of defendant's intoxication.

Register, 60 NY2d at 276.

The Court in *Register* stated that "in a depraved mind murder the actor's conduct must present a grave risk of death whereas in manslaughter it presents the lesser substantial risk of death". *Register*, 60 NY2d at 276. As to the distinguishing features of these risks, the Court made the following, somewhat baffling statement: "The phrase '[u]nder circumstances evincing a

depraved indifference to human life' refers to the wantonness of defendant's conduct and converts the *substantial* risk present in manslaughter into a *very substantial* risk present in murder". *Register*, 60 NY2d at 276-277 (emphasis added).

The Court in *Register* stated that while the concept of depraved indifference functions "to objectively define the circumstances which must exist to elevate a homicide from manslaughter to murder", *Register*, 60 NY2d at 278, "'recklessness' is", nevertheless, "the *mens rea*, and the only *mens rea*, of the crime". *Register*, 60 NY2d at 278. The *Register* Court also stated, however, that "the statutory requirement that the homicide result from conduct evincing a depraved indifference to human life is a legislative attempt to qualitatively measure egregiously reckless conduct and to differentiate it from manslaughter." *Register*, 60 NY2d at 279. Thus, while insisting that the "depraved mind" element of the crime is separate and distinct from the *mens rea* of recklessness, it is "egregious" recklessness which differentiates it from manslaughter.

Judge Jason, however, pointed out in his dissenting opinion in *Register* that:

> [a]s the majority concede[d], the predecessor statutes to subdivision 2 of section 125.25 of the Penal Law defined the requisite *mens rea* "as a depraved mind" . . . Thus, unless a significant change was intended by the Legislature in enacting subdivision 2 of section 125.25, this statute must be similarly construed as characterizing "depraved indifference" as a mens rea.

Register, 60 NY2d at 281-282. This contrary construction of the depraved mind murder statute, Judge Jason contended, "is not only consistent with the Legislature's intent, the history of the statute and precedent of th[e Court of Appeals], but is also in

line with the basic underpinnings of our system of criminal justice."

Judge Jason observed that "[t]he rule announced by the [*Register*] majority . . . effectively eviscerate[d] the distinction between manslaughter in the second degree (Penal Law, § 125.15, subd. 1) and murder in the second degree (Penal Law, § 125.25, subd. 2) with respect to the accused's state of mind." *Register*, 60 NY2d at 282. Judge Jason explained that a person acts with depraved indifference, thereby elevating his reckless conduct from manslaughter to murder, "not because the surrounding circumstances happened to create a 'grave' as opposed to a 'substantial' risk, but because the accused has acted with greater culpability and a wickedness akin to that of one whose conscious objective is to kill." *Register*, 60 NY2d at 286. Judge Jason continued:

> [A]s a result of the majority's interpretation of the statute, prosecutors will be able to obtain murder convictions simply by proving that the defendant acted recklessly in killing another. This is so because the simple fact that the defendant's conduct resulted in the victim's death will, with 20/20 hindsight, be proof enough to a jury that the circumstances existing at the time and place of the killing presented a "grave risk" of death and that the defendant, therefore, acted with depraved indifference to human life. This result is clearly at odds with the legislative scheme set forth in article 125 of the Penal Law.

Register, 60 N Y2d at 286-287.

In *People v Roe*, 74 NY2d 20 (1989), the majority of the Court, following *Register*, held that depraved indifference murder

> differs from manslaughter . . in that it must be shown that the actor's reckless conduct is imminently dangerous and presents a grave risk of death; in manslaughter, the conduct need only present the lesser 'substantial risk' of death . . . Whether the lesser risk sufficient for manslaughter is elevated into the very substantial risk present in murder . . . depends upon the wantonness of defendant's acts – i.e., whether they were committed "[u]nder circumstances evincing a depraved indifference to human life" (Penal Law § 125.25[2]). This is not a mens rea element which focuses "upon the subjective intent of the defendant, as it is with intentional murder (Penal Law, § 125.25, subd. 1)"; rather it involves "an objective assessment of the degree of risk presented by defendant's reckless conduct" . . .

Roe, 74 NY2d at 24. The *Roe* majority reiterated that "[t]he only culpable mental state required for murder under subdivision (2) of Penal Law § 125.25 (depraved indifference murder) . . . is recklessness – the same mental state required for manslaughter, second degree, under subdivision (1) of Penal Law § 125.15". *Roe*, 74 NY2d at 24. Emphasizing again that "depraved indifference" does not pertain to the *mens rea*, the Court stated:

> In a trial for murder under Penal Law § 125.25(2), proof of defendant's subjective mental state is, of course, relevant to the element of recklessness, the basic element required for both manslaughter in the second degree and depraved indifference murder (see, Penal Law § 15.05[3]). Evidence of the actor's subjective mental state, however, is not pertinent to a determination of the additional element required for depraved indifference murder: whether the objective circumstances bearing on the nature of a defendant's

> reckless conduct are such that the conduct creates a very substantial risk of death . . .

Roe, 74 NY2d at 24-25, *citing Register*, 60 NY2d at 276- 277; *People v Gomez*, 65 NY2d 9, 11.[6]

Judge Bellacosa, in a dissent in line with Judge Jason's in *Register*, observed that the majority opinion in *Roe* "finalizes the obliteration of the classical demarcation between murder and manslaughter in this State". *Roe*, 74 NY2d at 29. Judge Bellacosa explained that the "catapulting ingredients" which elevate reckless manslaughter to murder are "gravity and depravity" and that

> [o]ther synonyms used to try to understand the essence of the escalating difference include malignant, malicious, callous, cruel, wanton, unremorseful, reprehensible and the like. The semantics alone prove that the analysis necessarily includes some subjective, gradational assessment.
>
> While the tangible content of "depraved indifference to human life" is thus elusive, the wantonness of the conduct augmenting the reckless culpable mental state must also manifest a level of callousness and extreme cruelty as to be "equal in blameworthiness to intentional murder" . . . I allude to some of the same case illustrations in this regard as the majority does, except I emphasize the particular escalating depravity facts that the majority avoids:

---

[6] The Court stated: "Because the escalating factor – depraved indifference to human life – is based on an objective assessment of the circumstances surrounding the act of shooting and not the mens rea of the actor . . . the evidence . . . concerning defendant's mens rea – his emotional condition in the aftermath of the killing – . . . is beside the point." *Roe*, 74 NY2d at 25.

> firing a gun three times in a packed barroom, having boasted in advance an intention to kill someone (id.); driving a car at high speed on a crowded urban street and failing to apply the brakes after striking one person . . . [and] continuously beating a young child over a five-day period . . .

Roe, 74 NY2d at 29-30.

Judge Bellacosa, like Judge Jason, expressed concern about this "'evisceration' of the 'distinction' between manslaughter and murder", *Roe*, 74 NY2d at 31, *quoting Register*, 60 NY2d at 284, and stated that the majority's application of "depraved indifference" to the facts in *Roe* complete[d] the homogenization." *Roe*, 74 NY2d at 31. By affirming *Roe's* conviction, said Judge Bellacosa, the State courts had "functionally . . . discard[ed] and disregard[ed] the legislatively drawn distinction between manslaughter and murder". *Roe*, 74 NY2d at 35.

In *People v Cole*, 85 NY2d 990 (1995) the Court of Appeals rejected the defendant's contention that Penal Law § 125.25(4) is unconstitutionally vague:

> This Court held in *People v. Poplis*, 30 N.Y.2d 85, 88, 330 N.Y.S.2d 365, 281 N.E.2d 167 that "conduct with 'depraved indifference' to 'human life' * * * is the kind [of conduct] which has been rather well understood at common law." In fact, we stated in *Poplis* that brutality toward a child, such as the conduct with which defendant was charged, "fits within the accepted understanding of the kind of recklessness involving 'a depraved indifference to human life'" (*id.*, at 88, 330 N.Y.S.2d 365, 281 N.E.2d 167). Contrary to defendant's argument, our decision in *People v. Register*, 60 N.Y.2d 270, 469

> N.Y.S.2d 599, 457 N.E.2d 704, cert. denied 466 U.S. 953, 104 S.Ct. 2159, 80 L.Ed.2d 544 did not unsettle this well-established common-law understanding of the "depraved indifference" element. Rather, it merely clarified that that element is an objective aggravating circumstance rather than a part of the crime's mens rea.

Cole, 85 NY2d at 992.

Finally, in *People v Johnson*, 87 NY2d 357 (1996) -- in which the defendant shot the victim in a parking lot during an altercation -- the Court of Appeals held that Penal Law § 125.15(2) is not unconstitutionally vague because "conduct with depraved indifference to human life is well understood". *Id.* at 360, *citing Cole*, 85 NY2d 990, and *Poplis*, 30 NY2d 85, 88.

In view of these New York Court of Appeals decisions, Petitioner argued that the distinction between reckless manslaughter and depraved mind murder, as merely reflecting the distinction between a "substantial" and a "very substantial" risk, is unconstitutionally vague and necessarily results in arbitrary and irrational selectivity in the prosecution of these offensives.

The Decisions Below

The District Court agreed with Petitioner's claim that the New York Court of Appeals conflated the penal statutes defining "depraved indifference" murder and reckless manslaughter. The District Court held that "when two different statutes are construed by New York's highest Court to reach the same conduct, or indistinguishable conduct, and one carries a far lesser penalty, allowing a grand jury to choose to indict for either one is a clear denial of equal protection." *Jones*, at 9. The District Court concluded

> that the conviction for depraved indifference murder as applied to the facts of the case as the jury must have found them violated Petitioner's Constitutional right to the equal protection of the laws, as well as substantive due process. There was no rational basis by which a grand jury could choose to indict in this case for depraved indifference murder as opposed to reckless manslaughter, and the trial jury was denied the opportunity to choose between two identical crimes, one of which carries a far lesser penalty. A rational jury could not be expected to differentiate between a "grave risk of death" and a "substantial risk of death", as required by the New York Court of Appeals. This is a distinction without a difference . . .

Jones, at 10-11.[7]

---

[7] Shortly after the District Court's Decision issuing the writ, a seriously fractured Court of Appeals in *People v Sanchez*, 98 NY2d 373 (2002) revisited this issue. In a section of a dissenting opinion entitled "Conflating Depraved Indifference Murder with Second Degree Manslaughter", Judge Rosenblatt stated:

> To the extent that it endorses Register, the majority . . . conflates depraved indifference murder with reckless manslaughter. After today, depraved indifference murder can thus be used as a proxy for not one but two separate crimes.
>
> In concluding that depraved indifference murder has a mens rea of ordinary recklessness, the Court in Register essentially took the "depraved" out of depraved indifference, so that depraved indifference murder is virtually indistinguishable from reckless manslaughter. . .
>
> Register conflates the two crimes not only by giving them the same mens rea, but also by seeking to differentiate them only in terms of "objective circumstances" that are all but indistinguishable. Thus, for the factfinder, everything turns on whether the defendant's conduct created a "grave" risk of death as opposed to a "substantial" risk of death. I think it is too much to ask of any juror. The difference between reckless manslaughter, which carries a minimum punishment of one year in prison, and depraved indifference murder, which carries a minimum punishment

(continued...)

As to the issue of whether Petitioner met the exhaustion requirement of 28 U.S.C.A. § 2254(b)(1)(A), the District Court held:

> Petitioner argues, and this Court agrees, that in the context of this case, raising in the state court the issue of sufficiency of the evidence was sufficient to raise ("inextricably intertwined with") a challenge to the statutory criteria for distinguishing reckless manslaughter from depraved indifference murder.
>
> The requirement for exhaustion is not intended to exhaust the petitioner or his or her lawyers, but is designed to give the state courts the opportunity to address and correct violations of Constitutional rights. That purpose is fulfilled when the state court

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[7](...continued)
of 15 years in prison, should not turn on the razor-thin distinction between "substantial" and "grave."

Sanchez, 98 NY2d at 406-407. Judge Rosenblatt also observed that

> the Register Court's formulation has the effect of treating defendants with the exact same mental culpability unequally by giving them vastly different sentences even though their moral culpability is identical. This consequence violates a fundamental principle of the criminal law, which seeks to punish defendants in proportion to the blameworthiness of their offense. . . If depraved indifference murder and reckless manslaughter have the same mens rea (i.e., ordinary recklessness), then two defendants with exactly the same mental culpability can be separately convicted of two different crimes (murder and reckless manslaughter) and receive vastly different punishments. As one harsh critic of Register has asked, "How can it be just to punish for murder, one offender whose mental culpability is no greater than that of another guilty only of manslaughter--thereby exposing the former to an additional fifteen years of imprisonment?" (Gegan, More Cases of Depraved Mind Murder: The Problem of Mens Rea, 64 St. John's L. Rev. at 435.)

Sanchez, 98 NY2d at 407-408.

> has a fair and meaningful chance to grant relief on what is substantially the same claim raised in federal court. *O'Sullivan v. Boerckle* 526 U.S. 838, 844 (1999) *Vasquez v. Hillary* 474 U.S. 254, 257 (1986). In the context of this case, if they won't listen to Judge Bellacosa and they won't listen to Judge Jasen, they won't listen to Brian Jones, and no purpose will be served in staying this case for further exhaustion of state remedies.

Jones, at 11-12.

The Court of Appeals reversed the Decision of the District Court, holding that Petitioner failed to exhaust his federal constitutional claim in the state courts:

> In advancing his insufficiency claim in state court, Jones did not argue that New York's depraved indifference murder statute was unconstitutionally vague. Instead, he argued that the evidence demonstrated that he reasonably believed that Fields possessed a weapon and that he, fearing for his life, reacted in self defense. In other words, in the state courts, Jones pressed his claim of self defense; he presented neither the factual nor legal premises underpinning his subsequent claim that the statute itself was unconstitutionally vague. Accordingly, Jones failed to exhaust this claim.

Jones v Keane, 329 F.3d 290, 296 (2nd Cir 2003).

REASONS FOR GRANTING THE WRIT

Petitioner's Claims were Exhausted in the State Courts

Petitioner submits that his constitutional arguments concerning the statutory distinction between manslaughter and depraved indifference murder are interrelated with his arguments concerning the insufficiency of the evidence and, as such, were fairly presented in his state court proceedings.

The exhaustion doctrine provides that a habeas petitioner seeking to upset his state conviction on federal grounds must first have given the state courts a fair opportunity to pass upon his federal claim. *Picard v. Connor*, 404 U.S. 270, 275 (1971); 28 U.S.C.A. § 2254(b)(1)(A). This requirement is neither rigid nor inflexible, but is designed to give state courts the opportunity to address and correct alleged violations of federal rights. *Granberry v Greer,* 481 U.S. 129, 133-134 (1987) The exhaustion standard is met when a habeas petitioner previously provides the state courts with a fair and meaningful opportunity to grant relief on what is in "substance" the same claim now sought to be reviewed in federal court. *O'Sullivan v Boerckel,* 526 U.S. 838, 844 (1999); *Vasquez v Hillary,* 474 U.S. 254, 257 (1986). A habeas petitioner exhausts his available state court remedies by "fairly present [ing]" his claims to the state courts. *Wilwording v. Swenson*, 404 U.S. 249 (1971) (per curiam); *Galarza v Keane,* 252 F.3d 630, 638 (2nd Cir. 2001); *Daye v Attorney General,* 696 F.2d 186, 191 (2nd Cir. 1982) (*en banc*).

A defendant may "fairly present" the substance of a federal constitutional claim to the state court without citing "book and verse on the federal constitution." *Picard*, 404 U.S. at 278. A claim is "fairly presented" even when it is supported by varying legal arguments in the state courts. *Sanders v United States,* 373 U.S. 1, 16 (1963) What is important is that the state courts are given arguments that place them on notice of the elements of the

subject claim. *Wells v Maass*, 28 F.3d 1005, 1008-1009 (1st Cir. 1994) The requirement that the state court be given a reasonable opportunity to pass on the federal habeas claim is therefore satisfied if the legal basis of the claim made in state court was the "substantial equivalent" of that of the habeas claim. *Picard*, 404 U.S. at 278; *see also Ulster County Court v. Allen*, 442 U.S. 140, 147-48 n. 5 (1979).[8]

Petitioner's insufficiency-of-the-evidence claim to the state courts was the "substantial equivalent" of his federal constitutional claims to the federal courts. "New York State case law makes clear that the 'legally sufficient evidence' standard derives from the federal constitutional due process right discussed in *Jackson v. Virginia*, [443 U.S. 307, 321(1979)]" and that "[t]he New York Court of Appeals, in applying this standard, has frequently adverted to the *Jackson* case itself." *Santana v. Kuhlmann*, 232 F.Supp.2d 154, 165 (S.D.N.Y. 2002), *citing as examples*, *People v. Contes*, 60

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[8] "[T]he nature or presentation of the claim" in the state forum necessarily must be "likely to alert the court to the claims federal nature". *Lurie v Wittner*, 228 F.3d 113, 123 (2nd Cir. 2000), *quoting Daye*, 696 F.2d at 192. Put another way, the exhaustion doctrine requires that the issue be presented "in such a way as to make it probable that a reasonable jurist would have been alerted to the existence of the federal question". *Fortini v Murphy*, 257 F.3d 39, 44 (1st Cir. 2001), *quoting Scarpa v DuBois*, 38 F.3d 1, 6 (1st Cir.1994). "[A] petitioner need not expressly cite 'chapter and verse of the Constitution,'" *Cox v Miller*, 296 F.3d 89, 100 (2nd Cir. 2002), *quoting Daye*, 696 F.2d at 194, in order for the issue to be adequately presented. Citing a specific constitutional provision, while preferable, is not necessary to alert a state court as to the claim's federal nature. Other ways in which a petitioner may alert the state court to the constitutional nature of a claim without referring chapter and verse to the U.S. Constitution include (a) reliance on pertinent federal cases employing constitutional analysis, (b) reliance on state cases employing constitutional analysis in like fact situations, (c) assertion of the claim in terms so particular as to call to mind a specific right protected by the Constitution, and (d) allegation of a pattern of facts that is well within the mainstream of constitutional litigation. *Ramirez v Attorney*, 2001 WL 1028326, *5-6 (2nd Cir.).

N.Y.2d 620, 621 (1983); *People v. Taylor*, 94 N.Y.2d 910, 911 (2000); *see, also, Cowan v. Artuz*, 96 F.Supp.2d 298, 307 (S.D.N.Y.2000) (for exhaustion purposes, a claim in New York State court regarding sufficiency of evidence raises issue of federal due process); *compare, West v. Wright*, 931 F.2d 262, 266 (4th Cir. 1991), *reversed on other grounds*, 505 U.S. 277 (1992) ("Any challenge to the sufficiency of the evidence to convict in a state prosecution is necessarily a due process challenge to the conviction.") *citing Jackson*, 443 U.S. at 321; *In re Winship*, 397 U.S. 358, 364 (1970); *compare, also, Evans v. Court of Common Pleas, Delaware County, Pa.*, 959 F.2d 1227, 1231 (3rd Cir. 1992) (insufficiency of the evidence claim, even if framed in state law rather than federal constitutional terms, necessarily implicates federal due process rights); *Tamapua v. Shimoda*, 796 F.2d 261, 263 (9th Cir.1986) ("Sufficiency of evidence to convict is a fundamental concern of the due process clause.").

Thus the terms of Petitioner's state court claim on the insufficiency of the evidence, taken in light of the facts and verdict upon which it was based, quite clearly presented the Petitioner's constitutional due process claim. A review by the state courts of Petitioner's legal sufficiency argument necessarily involved a legal assessment of whether the required inferences of guilt could be rationally drawn from the proven facts. Bearing in mind that Petitioner was acquitted on the intentional murder count, the state court's assessment of the evidence had to be made on the assumption that Petitioner did not *intend* to cause the victim's death. The state courts were therefore squarely presented with the question of whether the evidence supported a finding of depraved indifference, as opposed to mere recklessness, which , in turn, required the state courts to attempt to draw a rational distinction between these two elements and to then apply that distinction, as interpreted by the New York Court of Appeals, to the facts of this case. When the District Court held that Petitioner's constitutional claim is

"inextricably intertwined" with the legal sufficiency issue, it was simply stating the obvious: that legal sufficiency cannot be determined without first understanding the difference between a "substantial risk of death" and a "very substantial risk of death".

Had Petitioner been found guilty of intentional murder, the legal sufficiency argument would not necessarily have entailed Petitioner's equal protection and due process issues. But, as the District Court noted, since the jury found that Petitioner did *not* intend to kill the victim, the legal sufficiency argument automatically triggered the question: what evidence in this record determined the degree of Petitioner's culpability? There is a critical difference between an analysis of the evidence to determine (1) whether it supports a finding of intent and, if so, whether such intent was justified as a matter of self defense, and (2) whether it supports a finding of depraved indifference as opposed to recklessness. Contrary to the reasoning of the Second Circuit, it was the latter, *not* the former, analysis which the state courts were asked to perform when Petitioner raised his legal sufficiency argument.

"[I]dentical grounds may often be supported by different legal arguments" and "[s]hould doubts arise in particular cases as to whether two grounds are different or the same, they should be resolved in favor of the applicant." *Sanders*, 373 U.S. at 16. "The legal theory relied upon in the federal court need not . . . be identical to the legal theory presented to the state courts". *Waterhouse v Rodriguez*, 848 F.2d 375, 380-381 (2nd Cir. 1988) While Petitioner's state counsel may not have explicitly challenged the statutory criteria for distinguishing reckless manslaughter from depraved indifference murder, such a challenge was inextricably intertwined with Petitioner's argument that the evidence did not support a finding of the more serious crime.

Claims may be substantially re-formulated and survive the exhaustion defense. *Vasquez v Hillery*, 474 U.S. 254 (1986)[9] In *Daye v. Attorney General of State of N.Y.*, 696 F.2d 186, 192 (2nd Cir. 1982), the Second Circuit observed that while "[t]he chief purposes of the exhaustion doctrine would be frustrated if the federal habeas court were to rule on a claim whose fundamental legal basis was substantially different from that asserted in state court", the phrase "same legal 'basis' or 'doctrine'" does not "mean that there can be no substantial difference in the legal theory advanced to explain an alleged deviation from constitutional precepts." *Daye*, 696 F.2d at 192, fn. 4. Thus, for example,

> constitutional doctrine forbids use of a confession against a defendant unless the confession was voluntary. A number of legal theories may be advanced as to why a confession was not voluntary. Yet all that is needed to alert the state courts to the constitutional nature of the claim is the exposition of the material facts and the assertion that the confession was not voluntary. In United States ex rel. Kemp v. Pate, 359 F.2d 749 (7th Cir.1966), for example, the petitioner challenged the voluntariness of his confession in both court systems. In state court he argued that he had confessed as a result of physical coercion; in federal court he added the argument that coercion was shown by the "totality of the circumstances," including psychological coercion. The Seventh Circuit held that state remedies had been

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[9] The exhaustion requirement does *not* forbid a habeas petitioner from providing additional legal support in his federal petition. *MacFarlane v Walter*, 179 F.3d 1131, 1138 n 9 (9th Cir. 1999), *vacated and remanded on other grounds* 120 S.Ct. 1959 (2000) ("[e]xhaustion of remedies does not require that the state have had the opportunity to pass on the claim under the particular authorities advanced in the federal habeas court")

> exhausted, because, although the defendant had not made the "totality of the circumstances" argument in state court, the ultimate constitutional question – the voluntariness of the confession – had been presented.

Daye, supra. The *Daye* Court further noted that *Kemp* was cited with approval by this Court in *Picard* as follows:

> Obviously there are instances in which "the ultimate question for disposition," *United States ex rel. Kemp v. Pate*, 359 F.2d 749, 751 (CA7 1966), will be the same despite variations in the legal theory or factual allegations urged in its support. A ready example is a challenge to a confession predicated upon psychological as well as physical coercion. *See Sanders v. United States*, 373 U.S. 1, 16, 83 S.Ct. 1068, 1077, 10 L.Ed.2d 148 (1963).

Daye, supra, quoting Picard, 404 U.S. at 277.[10]

In the case at bar, one of the "the ultimate question[s] for disposition" was whether Petitioner's conviction was based upon insufficient evidence and therefore in violation of his federal constitutional right to due process. Despite any presumed "variations in the legal theory" between Petitioner's state court motions and appeal, on the one hand, and his federal

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[10] See, also, *Ramirez v Attorney*, 2001 WL 1028326, *5-6 (state court argument which contained no reference to the Sixth Amendment right of effective assistance nevertheless permitted federal *habeas* review of that claim because the discussion in the state court application regarding lapses in representation was enough "to call to mind [the Sixth Amendment's] specific right [to the effective assistance of counsel]"); *Gonzalez v Sullivan*, 934 F.2d 419 (2nd Cir. 1991) (a petitioner's mere citation to the Fourteenth Amendment in heading of brief, without even minimal argument or citation to federal cases, satisfied exhaustion requirement by placing state courts on notice of due process claim.).

court habeas petition, on the other, the question of due process remained the same. Just as "a number of legal theories may be advanced as to why a confession was not voluntary", *Daye*, *supra*, so, too, may "a number of legal theories be advanced as to why" Petitioner's verdict was not supported by legally sufficient evidence and was therefore violative of Petitioner's right to due process. Petitioner's argument concerning the unconstitutionality of the statutory scheme is simply additional legal support to his insufficiency/due process argument, and not a separate, independent challenge.

Petitioner therefore submits that his state court sufficiency-of-the-evidence claim fairly informed the state courts of both the factual and the legal premises of his constitutional claim and provided those courts with a meaningful opportunity to take corrective action. Accordingly, the Court of Appeals below erred in holding that Petitioner failed to satisfy the exhaustion requirement.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ROBERT N. ISSEKS, ESQ.
ALEX SMITH, ESQ.
Attorneys for Petitioner
6 North Street
Middletown, New York 10940
(845) 344-4322

Appendix A—Memorandum & Order of the United States District Court for the Southern District of New York (Brieant, J.) dated May 22, 2002

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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BRIAN JONES,

Petitioner,

02 Civ. 1804 (CLB)

-against-

MEMORANDUM & ORDER

JOHN KEANE, Superintendent, etc.,

Respondent.

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Brieant, J.

By his counseled petition docketed March 6, 2002, Mr. Brian Jones, a state prisoner seeks a writ of habeas corpus pursuant to 28 U.S.C. Section 2254. The following sets forth the findings of fact and conclusions of law of this Court, based solely upon the official record. The petition is timely and, as noted below, all claims have been subject to exhaustion, although the latter point is in dispute.

After a jury trial conducted before County Judge Patsalos of Orange County, Petitioner was convicted of murder in the 2nd degree, (depraved indifference murder) under Section 125.25(2) of the New York Penal Law and also of related weapons offenses in connection with the murder. The jury acquitted him of intentional murder under Section 125.25(1).

On the evening of June 17, 1996, at 11:00 P.M. in the City of Newburgh, Orange County, New York, the Petitioner fired two

shots which killed Germaine Fields, an eighteen year old male who had engaged in a street fight with Petitioner and others. Mr. Fields died. Mr. Jones fled but was arrested the following morning.

On December 20, 1996, the Court sentenced Petitioner on three different counts, the longest of which is nine years to life. The conviction was affirmed on direct appeal (*People v. Jones* 266 AD 2d 636) and leave to appeal was denied by the New York Court of Appeals on May 24, 2000 (*People v. Jones* 95 NY 2d 798). Thereafter, the Petitioner commenced a *coram nobis* proceeding in the Appellate Division claiming for the first time that he had been denied effective assistance of Appellate Counsel. He also moved in the County Court under New York CPL § 440.10, to vacate the judgment because of ineffective assistance by trial counsel. Both of these applications were denied, and leave to appeal from the denial of the Section 440.10 motion was denied by the Appellate Division on February 20th, 2002.

The Jury Challenges

The Petition alleges as a separate ground for relief that the Petitioner's trial attorney was ineffective because he failed to exhaust Petitioner's peremptory challenges and the appellate attorney was ineffective in failing on direct appeal to raise the jury selection issue. A juror, Shirley Grammas, was challenged for cause by defense counsel after she had told the Court that she hoped she would not be selected, and that she had diabetes and high blood pressure and feared that her sugar level and blood pressure might increase if she were involved in a verbal disagreement with other jurors, and that if she became emotionally upset, she might not be able to serve. There was no indication of bias, or that Ms. Grammas could not give a fair and impartial verdict.

Although the prosecutor did not oppose this challenge for cause, it was denied by the trial judge at a time when defense counsel had one peremptory strike remaining. The ineffective assistance is said to arise from the fact that Counsel did not premptorally strike Juror Grammas who because the twelfth member of the panel. The next prospective juror was sworn in as the first alternate without any challenge from Defense Counsel. This point is mentioned by Petitioner as supporting an inference that the Trial Counsel did not fail to exercise his last peremptory because he was concerned over the suitability of the next prospective juror.

No issue involving jury selection was raised by Appellate Counsel and, indeed, Appellate Counsel was not in possession of the transcript of the proceedings during which the jury was selected. The real point is that the trial judge had arguably denied improperly two previous challenges for cause, thereby forcing defense counsel to use two peremptories. In order to preserve these arguably erroneous rulings for appellate review, counsel had to exhaust all his peremptory challenges. This he did not do.

This issue is without merit. To prevail on such an issue, Petitioner must show cause and prejudice. There is no prejudice. The two prior challenged jurors did not serve, and there is no reason to find bias on the part of Ms. Grammas, who simply did not want to serve in a contested trial because of concern over her medical condition, tainted the verdict in any way.

The incident

Viewed most favorably to the Prosecution, the trial record shows that Petitioner, age 15 at the time of the event, was engaged in a sexual relationship with Latoya Williams, another minor, who was expecting Petitioner's child. Two or three days prior to the event, Miss Williams had informed Petitioner that

Germaine Fields had expressed an intention to stab Petitioner in the stomach. Petitioner had accused Fields of "coming on" to his girlfriend. Fields, a recent arrival in the community and purportedly a member of the Crips street gang, denied doing so.

On the evening of June 17, 1996, at about 11:00 P.M., in the street, three or four doors from Miss Latoya Williams home, she and Petitioner were in conversation, when Fields appeared out of the darkness and began cursing the Petitioner. Latoya's father, John Smith, entered the discussion. The confrontation escalated and ultimately Miss Williams and Fields became entangled in a struggle and both fell to the sidewalk with Latoya on top, being held by Fields. Petitioner shot Fields twice, from a distance of two feet pointing the gun downward at him while he was lying on the sidewalk on his back.

A large number of witnesses testified to having observed all or part of the crime scene. There was no credible evidence that the deceased was armed, although Petitioner testified he thought this to be the fact. It was clear that a violent fight was in progress immediately prior to the shooting, in which Fields was the aggressor. Both bullets struck Mr. Fields in the neck. He arrived at the emergency room of St. Luke's Hospital without a pulse and not breathing and died either on or shortly prior to arrival. On the early morning of June 18th, 1996, Petitioner was arrested at a motel in Poughkeepsie, registered under a false name.

The Challenge to the Statute

Petitioner testified in his own defense that he had been threatened by Fields and told to leave the scene or he would get killed. He said that he thought Fields had a gun and was reaching for an object in his pocket which appeared to be a weapon, while Fields was on the ground holding on to Latoya Williams. As soon as Field's hand entered his pocket, Petitioner

fired. Petitioner asserted that he was afraid Fields was going to kill him and was concerned that Latoya had been hurt by Fields. He claimed that at the time he fled he did not know whether Fields had been hit by either bullet. Petitioner testified that he was not trying to kill Field's but was just trying to hurt him. The jury is deemed to have rejected the contention of Petitioner that this intentional shooting was in self defense.

After all the evidence had been received, the defense asked that Trial Judge to charge the lesser included offense of criminally negligent homicide, New York Penal Law § 125.15, but this application was denied. As noted earlier, Mr. Jones was acquitted of intentional murder but found guilty of depraved indifference murder and the two weapons counts.

Sub-paragraph 2 of Section 125.25 of the New York Penal Law under which Petitioner was convicted defines an alternate version of murder in the second degree when "under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person". In contrast, Section 125.15 of the Penal Law which defines manslaughter in the second degree, reads in relevant part, as follows:

"A person is guilty of manslaughter in the second degree when:

1. He recklessly causes the death of another person".

Petitioner argues as his second claim, that as a matter of constitutional law, there is no statutory distinction between reckless manslaughter, and depraved indifference murder, and that the statutory definition of depraved indifference murder is unconstitutionally vague.

Certainly this is not true on the face of the statutes and Petitioner apparently does not so contend. A persistent series of judicial glosses placed on the statutory use of "depraved indifference murder", by New York's highest court seems to have, in effect, removed any distinction between the two crimes. This, it is contended, thereby violates the constitutional rights of persons convicted under the more serious of the two offenses.

There is a statutory definition of recklessness found in Penal Law Section 15.05. A person acts recklessly "when he is aware of and consciously disregards a substantial and unjustifiable risk that [a result described by a statute defining an offense] will occur or that such circumstances exist." The risk must be of such a nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation."

There are a number of reported cases in the New York courts at all levels holding that the statutory reference to depraved indifference murder is not so vague as to violate substantive due process or equal protection rights of defendants. The words do possess a clear meaning in the general speech of the people and standing alone should be sufficient to give adequate warning to a non-lawyer member of the public as to what conduct is rendered unlawful by the statute. Classic textbook definitions abound: throwing the classic squib into the market place is depraved indifference. The New York Court of Appeals held in *People v. Jernatowski* 238 NY 188 (1924) that firing two or more shots from the street into a house where the Defendant knew that human beings were present, and killing one of the occupants constituted depraved indifference murder. In *People v. Poplis* 30NY 2d 85, 87 (1972), the New York Court of Appeals upheld the statute in a situation where "repeated brutal, callous and inhuman beatings" inflicted on a small child over several days resulted in injuries producing death.

Later, in *People v. Register* 60 NY 2d 270 (1983), cert. den. 466 US 953 (1984), the New York Court of Appeals considered a factual situation where the Defendant, intending to shoot one Mitchell, shot and killed another person. This case concerned primarily the issue of voluntary intoxication as bearing on intent, and arose in the context of a shooting incident in the early morning in a crowded saloon. The Court in *Register* held that the statutory phase "under circumstances evincing a depraved indifference to human life" referred only to the factual setting in which a crime occurs and contrasted the case with manslaughter in the second degree by holding that the "statute requires in addition not only that the conduct which results in death present a grave risk of death, but that it also occur under circumstances evincing a depraved indifference to human life". The Court held, "this additional requirement refers to neither the *mens rea* or the *actus reus.* If it states an element of the crime at all, it is not an element in the traditional sense but rather a definition of the factual setting in which the risk creating conduct must occur - objective circumstances which are not subject to being negatived by evidence of Defendant's intoxication." The Court also held that in a "depraved mind murder the actor's conduct must present a grave risk of death whereas in manslaughter it presents the lesser substantial risk of death (*Register*, 60 NY 2d 276). It went on to hold that the phrase refers to the "wantonness of Defendant's conduct and converts the *substantial* risk present in manslaughter to a *very substantial* risk present in murder (Id at p. 276-277). This seems to be a largely circular definition worthy of the committee that wrote the Internal Revenue Code, and tells us not very much. The dissenting opinion of Judge Jasen observed, and this Court agrees that the *Register* opinion "effectively eviscerated the distinction between manslaughter in the second degree, Penal Law Section 125.15(1) and murder in the second degree, Penal Law Section 125.25(2) with respect to the accused's state of mind", *Register* 60 NY 2d 282.

Later in *People v. Roe* 74 NY 2d 20 (1989), arising out of a killing resulting from Russian roulette (described by the perpetrator as Polish roulette), a majority of the Court, following *Register*, held that depraved indifference murder differs from manslaughter only in that the actor's reckless conduct must be imminently dangerous and present a grave risk of death, while in manslaughter, the conduct need only present a less substantial risk of death. This constitutes another play on words substantially similar to the definition imposed by the Court in *Register* and evoked a dissent by Judge Bellacosa, in which he observed that the majority "finalizes the obliteration of the classical demarcation between murder and manslaughter in this state" Roe 74 NY 2d at 29.

Later cases which continued this anomalous construction placed on the statute initially in the *Register* case include *People v. Cole* 85 NY 2d 990 (1995) and *People v. Johnson* 78 NY 2d 357 (1996). In the latter case, the Court of Appeals held that the language was not unconstitutionally vague, because conduct with depraved indifference to human life is well understood.

This Court agrees that the concept of depraved indifference to human life is well understood, and is essentially self-defining notwithstanding the confusing glosses placed on the statute by *Register* and its progency. But when two different statutes are construed by New York's highest Court to reach the same conduct, or indistinguishable conduct, and one carries a far lesser penalty, allowing a grand jury to choose to indict for either one is a clear denial of equal protection.

More likely, once the jury concluded that self defense was not involved, this case really became one of intentional

homicide.[1] The opportunity to submit what is at least by appearance a lesser included offense to intentional murder to the jury, as was done in this case, allows hesitant compromisers to reach a verdict under conditions such as in this case, where they were apparently reluctant to convict Mr. Jones of intentional murder. There is nothing in our constitutional jurisprudence to prevent this.

Clearly it cannot be said that the statute is vague as applied in the case of a person who deliberately pumps two shots into the neck of someone who is lying on the ground at a distance of two feet. It is ordinarily thought that one who has received from a statute fair warning of the criminality of his own conduct, is not entitled to attack it because the language would not give similar fair warning with respect to other conduct which might be within its broad and literal ambit. *Parker v. Levy* 417 U.S. 733, 756 (1973); *United States v. Rybicki*, 287 F. 3d 257, 263 (2d Cir. 2002).

In most cases, where a penal statute is found unconstitutionally vague as applied, the result is that the accused goes free. This is not such a case, because the conduct of which Mr. Jones was convicted, as apparently viewed by the jury, would have resulted in a conviction for the lesser crime of reckless manslaughter. That the New York Court of Appeals has conflated the two statutory crimes is a matter of considerable concern to this Court. That the New York caselaw has merged this offense with the less serious available charge of manslaughter 2d, raises a serious issue of equal protection, and a strong possibility of prosecutorial discrimination against minorities or unpopular defendants. This Court concludes that the conviction for depraved indifference murder as applied to

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[1] While New York law requires a person asserting self-defense to "retreat to the wall", in practice juries tend to apply the standards of the OK Corral when the facts show a killing really was committed in self-defense.

the facts of the case as the jury must have found them violated Petitioners' Constitutional right to the equal protection of the laws, as well as substantive due context of this case, if they won't listen to Judge Bellacosa and they won't listen to Judge Jasen, they won't listen to Brian Jones, and no purpose will be served in staying this case for further exhaustion of state remedies.

Conclusion

Petitioner's Constitutional rights to equal protection of the law and substantive due process were violated when a trial jury was permitted to convict him of the most severely punished of two statutory crimes which under the state's reported decisions had become one. The Writ shall issue unless the prosecution within thirty (30) days resentences Petitioner for Manslaughter in the Second Degree. The Clerk shall file a final judgment to that effect which shall provide that its operation is stayed pending appellate finality.

SO ORDERED.

Dated: White Plains, NY
May 22, 2002

s/CHARLES L. BRIEANT
Charles L. Brieant, U.S.D.J.

Appendix B—Opinion of the United States Court of Appeals for the Second Circuit dated May 13, 2003

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2002
(Argued: February 19, 2003 Decided: May 13, 2003
Amended: May 14, 2003)
Docket No. 02-2382

BRIAN JONES,

Petitioner-Appellee,

-v.-

JOHN KEANE, SUPERINTENDENT, WOODBOURNE CORRECTIONAL FACILITY,

Respondent-Appellant.

Before:

OAKES, KEARSE, AND B. D. PARKER, JR.,
Circuit Judges.

Appeal from the grant of a petition for a writ of habeas corpus by the United States District Court for the Southern District of New York (Charles L. Brieant, *Judge*). The Court concluded that New York's second-degree murder statute, N.Y. Penal Law § 125.25(2), under which petitioner-appellee Brian Jones was convicted, was unconstitutionally vague because it

covered conduct indistinguishable from that covered by New York's significantly less serious reckless manslaughter statute, N.Y. Penal Law § 125.15. Since Jones failed to exhaust this claim, we reverse.

ANDREW R. KASS, Assistant District Attorney (Richard A. Brown, District Attorney of Queens County, John M. Castellano, Assistant District Attorney, of counsel and on the brief), for Francis D. Phillips, II, District Attorney of Orange County, Goshen, NY, *for Respondent-Appellant.*

ROBERT N. ISSEKS, (Alex Smith, on the brief), Middletown, NY, *for Petitioner-Appellee.*

B. D. PARKER, JR., *Circuit Judge*:

Respondent-appellant John P. Keane, superintendent of the Woodbourne Correctional Facility, appeals the grant of Brian Jones's petition for a writ of habeas corpus by the United States District Court for the Souther District of New York (Brieant, J.). Jones claimed, and the court agreed, that the New York second-degree murder statute, under which he was convicted, was unconstitutionally vague. *See* N.Y. Penal Law § 125.25(2). Although he had not raised this argument in state-court proceedings, Jones argued that the claim was nonetheless exhausted because of its close relationship with an insufficiency-of-the-evidence claim he had raised on direct appeal. Since we conclude the claim was exhausted, we reverse.

I. BACKGROUND

Jones was convicted by a jury in County Court, Orange County, New York, of Murder in the Second Degree[1] and Criminal Possession of a Weapon in the Second[2] and Third Degrees[3] and sentenced in December 1996, as a juvenile, to concurrent sentences of nine years to life on the murder charge, two to six years on the second-degree weapons-possession charge, and one to three years on the third-degree weapons-possession charge. The conviction stemmed from a June 1996 altercation in the City of Newburgh, involving Jones, LaToya Williams (Jones's girlfriend), and Germaine Fields. While attempting to separate the two young men, Williams fell to the ground with Fields. Jones then fired two shots, killing Fields. At trial, Jones testified that he did not intend to kill Fields but, fearing that he was armed, was animated at least in part by concerns of self defense.

Jones was charged with one court of intentional murder under N.Y. Penal Law § 125.25(1), one count of depraved indifference murder under N.Y. Penal Law § 125.25(2), and criminal possession of a weapon in the second and third degrees. The jury acquitted Jones of intentional murder, but, as noted,

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[1] N.Y Penal Law § 125.25(2), provides that a person is guilty of murder in the second degree when "[u]nder circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person."

[2] To the extent pertinent here, under N.Y. Penal Law § 265.03, a person is guilty of criminal possession of a weapon in the second degree when he possesses a loaded firearm "with intent to use the same unlawfully against another."

[3] To the extent pertinent here, under N.Y. Penal Law § 265.02, a person is guilty of criminal possession of a weapon in the third degree when he possesses a loaded firearm unless "such possession takes place in such person's home or place of business."

convicted him of second-degree ("depraved indifference") murder and on the two weapons-possession counts.

On direct appeal, Jones argued that the evidence at trial was insufficient to establish his guilt on the second-degree murder charge and that, instead, the evidence showed that his actions were justified "due to a reasonable fear for his safety." This argument was rejected by the Appellate Division, which affirmed Jones's conviction. *People v. Jones*, 696 N.Y.S.2d 902 (2d Dep't 1999). Leave to appeal was denied by the New York Court of Appeals. *People v. Jones*, 95 N.Y.2d 798 (2000). Jones then applied for writ of error *coram nobis*, asserting that he was denied effective assistance of appellate counsel. This application was denied. *People v. Jones*, 732 N.Y.S.2d 361 (2d Dep't 2001). Jones also moved in the County Court under N.Y. Crim. Proc. Law §440.10 to vacate his conviction because of ineffective assistance of trial counsel. But this motion was also denied, as was leave to appeal it.

Jones then turned to federal court, filing a petition for a writ of habeas corpus. *See* 28 U.S.C. § 2254. In this petition, Jones asserted, as in state court, that the evidence was insufficient to support his murder conviction and that his trial and appellate counsel had provided ineffective representation. Jones also argued, however, that the crime of depraved indifference murder is unconstitutionally vague, owing to "confused and contradictory" efforts to interpret "depraved indifference" by the New York Court of Appeals. Hab. Pet. at 18. These efforts, Jones contended, have made depraved indifference murder indistinguishable from the crime of reckless manslaughter. This elision, according to Jones, creates the potential for unconstitutional variances in the charges prosecutors can lodge

and sentences that may be imposed for essentially the same conduct.[4]

More specifically, Jones argues that the New York Court of Appeals erred in concluding, beginning with *People v. Register*, 60 N.Y.2d 270 (1983), that depraved indifference murder does not require "an 'uncommonly evil and morally perverse frame of mind,'" *People v. Sanchez*, 98 N.Y.2d 373, 383 (2002) (quoting *id.* at 396 (Rosenblatt, J., dissenting)), and instead that "the crux" of this crime "is recklessness exaggerated by indifference to the circumstances objectively demonstrating the enormity of risk of death from the defendant's conduct." *Id.* at 380. Jones contends that the depraved indifference murder statute is unconstitutional, as so interpreted, because it cannot be distinguished from reckless manslaughter, which occurs when a person "recklessly causes the death of another person." N.Y. Penal Law § 125.15(1).

The "failure of the [depraved indifference] statute to adequately define the more serious *mens rea*" creates the risk, according to Jones, "that prosecutors and juries [will] arbitrarily and erratically determine which crime to prosecute or to apply." Appellee Br. at 25 (citing, among other authorities, *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) ("Where the legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'"

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[4] Although reckless manslaughter carries a minimum punishment of only a year in prison, depraved indifference murder carries a minimum punishment of 15 years in prison. *See* N.Y. Penal Law § 70.00(3)(a) and (b); *People v. Sanchez*, 98 N.Y.2d 373, 407 (Rosenblatt J., dissenting).

(quoting *Smith v. Goguen*, 415 U.S. 566, 575 (1974))).[5] While conceding that this claim had not been specifically raised in state court, Jones asserted that his vagueness claim was nonetheless exhausted because it was "interrelated" with an insufficiency-of-the-evidence claim raised on direct appeal.

The District Court granted the petition. It first concluded that the depraved indifference murder and reckless manslaughter statutes were, on their face, neither vague nor indistinguishable. But it accepted Jones's argument that attempts by the New York Court of Appeals to interpret "depraved indifference" had resulted in "a largely circular definition worthy of the committee that wrote the Internal Revenue Code" and had effectively eviscerated any meaningful distinction between depraved indifference murder and reckless manslaughter. Mem. and Order, May 22, 2002, at 8. The District Court found that the conflation of conduct covered by the two closely related crimes violated equal protection and substantive due process. It further agreed with Jones that presenting his insufficiency-of-the-evidence claim in state court sufficed to exhaust his vagueness claim, finding the two "substantially the same." *Id.* at 11.

II. DISCUSSION

We review *de novo* the District Court's grant of habeas corpus and we review its factual findings for clear error. *Jenkins v. Artuz*, 294 F.3d 284, 290 (2d Cir. 2002). Although the parties

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[5] Jones's position is shared by some members of the New York Court of Appeals, who have dissented when that court has rejected similar vagueness challenges. *See. e.g., Register*, 60 N.Y.2d at 281-88 (Jasen, *J.*, dissenting); *People v. Roe*, 74 N.Y.2d 20, 29-38 (1989) (Bellacosa, *J.*, dissenting), *Sanchez*, 98 N.Y.2d at 407 (Rosenblatt, *J.*, dissenting) ("[T]he *Register* Court's formulation has the effect of treating defendants with the exact same mental culpability unequally by giving them vastly different sentences even though their moral culpability is identical.").

raise a number of issues, we address principally the exhaustion issue since we conclude it is dispositive.

A. Vagueness and Exhaustion

With exceptions not relevant here, federal habeas relief is not available unless "the applicant has exhausted the remedies available in the courts of the State."[6] 28 U.S.C. § 2254(b)(1)(A). The exhaustion requirement "springs primarily from considerations of comity" between the federal and state judicial systems. *Daye v. Att'y Gen. Of N.Y.*, 696 F.2d 186, 191 (2d Cir. 1982) (en banc). By requiring exhaustion, federal courts recognize that state courts, "no less than federal courts, are bound to safeguard the federal rights of state criminal defendants." *Id.* Besides serving "to minimize friction between our federal and state systems of justice," *Duckworth v. Serrano*, 454 U.S. 1, 3 (1981) (per curiam), the exhaustion requirement has the salutary practical effect of enhancing the familiarity of state courts with federal constitutional issues. *See Rose v. Lundy*, 455 U.S. 509, 519 (1982).

Exhaustion requires a petitioner fairly to present the federal claim in state court. *See Strogov v. Att'y Gen. Of N.Y.*, 191 F.3d 188, 191 (2d Cir. 1999). "A petitioner has 'fairly presented' his claim only if he has 'informed the state court of both the factual and the legal premises of the claim he asserts in federal court.'" *Dorsey v. Kelly*, 112 F.3d 50, 52 (2d Cir. 1997) (quoting *Daye*, 696 F.2d at 191). The claim presented to the state court, in other words, must be the "substantial equivalent" of the claim raised in the federal habeas petition. *Strogov*, 191 F.3d at 191 (quoting *Picard v. Connor*, 404 U.S. 270, 278 (1971)).

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[6] As modified by AEDPA, the federal habeas statute permits federal courts to *deny* unexhausted claims on the merits. *See* 28 U.S.C. § 2254(b)(2).

As noted, the District Court found that the insufficiency of the evidence claim that Jones presented in state court was the substantial equivalent of the claim of unconstitutional vagueness raised in his federal habeas petition. The court also expressed concern that presentation of the vagueness claim in state court may well have been futile. As explained by the District Court:

> Petitioner argues, and this Court agrees, that in the context of this case, raising in the state court the issue of insufficiency of the evidence was sufficient to raise ("inextricably intertwined with") a challenge to the statutory criteria for distinguishing reckless manslaughter from depraved indifference murder.
>
> The requirement for exhaustion is not intended to exhaust the petitioner or his or her lawyers, but is designed to give the state courts the opportunity to address and correct violations of Constitutional rights. That purpose is fulfilled when the state court has a fair and meaningful chance to grant relief on what is substantially the same claim raised in federal court. *O'Sullivan v. Boerckle[,]* 526 U.S. 838, 844 (1999)[;] *Vasquez v. Hillary[,]* 474 U.S. 254, 257 (1986). In the context of this case, if they won't listen to Judge Bellacosa and they won't listen to Judge Jasen, they won't listen to Brian Jones, and no purpose will be served in staying this case for further exhaustion of state remedies.[7]

Mem. and Order, May 22, 2002, at 11-12.

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[7] The District Court's reference to New York Court of Appeals Judges Bellacosa and Jasen is to dissenting opinions authored by these Judges. *See supra* note 5.

But the fact that the New York Court of Appeals may have been unlikely to grant Jones relief on his vagueness claim does not cure his failure to have raised it in state courts. It is well established that a petitioner may not bypass state courts merely because they may be unreceptive to the claim. *See Bousley v. United States*, 523 U.S. 614, 623 (1998) ("'[F]utility cannot constitute cause,'" for procedural default because of failure to raise claim on direct review, "'if it means simply that a claim was unacceptable to that particular court at that particular time.'") (quoting *Engle v. Isaac*, 456 U.S. 107, 130 n.35 (1982) (internal quotation marks in *Engle* omitted)); *Rosario v. United States*, 164 F.3d 729, 733 (2d Cir. 1998).

We also conclude that the insufficiency-of-the-evidence claim Jones asserted on direct appeal was not substantially the same as his vagueness claim since the insufficiency claim did not alert the state court to a claim of statutory vagueness. In his insufficiency claim, Jones did not challenge the type of conduct that would constitute depraved indifference murder but argued that sufficient evidence had not been presented at trial. Indeed, Jones recited the elements of second-degree murder in his appeal, without indicating any concern that these elements were unconstitutionally vague:

> In order to be found guilty of second degree murder [citation omitted] the People were required to prove that "under circumstances evincing a depraved indifference to human life" Appellant engaged in conduct which creates a grave risk of death and causes the death of another person. This simply was not proven.

Appellee Br. before N.Y. App. Div. At 9.

Sometimes, of course, issues of vagueness and of the sufficiency of the evidence may overlap. In *Strogov*, for example, a habeas petitioner, who had been convicted in state

court of grand larceny for submitting fraudulent Medicaid billing claims, argued on appeal that the evidence presented at trial did not establish her criminal intent to violate the statute, because the Medicaid billing code was ambiguous. But even there, where claims of vagueness and insufficiency were explicitly linked, we held that reliance on a statute's ambiguity in support of an insufficiency of the evidence claim on appeal did not suffice to exhaust a constitutional vagueness claim raised in the habeas petition, because the petitioner had failed to present the state courts with "'essentially the same legal doctrine'" asserted in the habeas petition. 191 F.3d at 192 (quoting *Daye*, 696 F.2d at 191-92).

In advancing his insufficiency claim in state court, Jones did not argue that New York's depraved indifference murder statue was unconstitutionally vague. Instead, he argued that the evidence demonstrated that he reasonably believed that Fields possessed a weapon and that he, fearing for his life, reacted in self defense. In other words, in the state courts, Jones pressed his claim of self defense; he presented neither the factual nor legal premises underpinning his subsequent claim that the statute itself was unconstitutionally vague. Accordingly, Jones failed to exhaust this claim. *See Strogov*, 191 F.3d at 193.

We also agree with respondent that Jones has procedurally defaulted his vagueness claim since New York's procedural rules now bar Jones from raising it in New York courts. Further direct review by the Court of Appeals is no longer available, *see* N.Y. Rules of Court, Court of Appeals, § 500.10(a) (authorizing only one request for review of conviction), and the failure to have raised the claim on direct review now forecloses further collateral review in state court. *See* N.Y. Crim. Proc. Law § 440.10(2)(c) (barring review if claim could have been raised on direct review). In the case of procedural default, we may reach the merits of the claim "only if the defendant can first demonstrate either cause and actual prejudice, or that he is

actually innocent." *Bousley*, 523 U.S. at 622 (internal quotations and citations omitted). Since Jones has not attempted to meet this standard, we do not reach the merits of his claim.

B. Other Claims

Jones also urges us to affirm the District Court's grant of habeas relief on alternative grounds: that the evidence was insufficient to establish his guilt, that his trial counsel was ineffective for failing to exhaust his peremptory challenges—so as to preserve his ability to appeal the trial court's denial of certain challenges for cause—and that his appellate counsel was ineffective for failing to raise this claim on appeal. We cannot consider these alternative grounds, however, because "a habeas petitioner to whom the writ has been granted on one or more grounds may not assert, in opposition to an appeal by the state, any ground that the district court has not adopted unless the petitioner obtains a certificate of appealability permitting him to argue that ground." *Grotto v. Herbert*, 316 F.3d 198, 209 (2d Cir. 2003). Jones has not received a certificate of appealability on any grounds not adopted by the District Court. Moreover, were we to treat his appellate brief as a request for such a certificate, we would deny the request because he has failed to make a substantial showing of the denial of a constitutional right. *See id.* at 209-10; 28 U.S.C. § 2253(c)(2).

CONCLUSION

For the foregoing reasons, the judgment of the District Court is reversed and Jones's petition is dismissed.

Appendix C - Amended Judgment of the United States District Court for the Southern District of New York dated June 6, 2002

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- x

Brian Jones,

02 CV 1804 (CLB)

Petitioner,

AMENDED
JUDGMENT

-against-

John Keane, Superintendent,
Woodbourne Correctional Facility,

Respondent.

- x

Whereas the above entitled action having been assigned to the Honorable Charles L. Brieant, U.S.D.J., and the Court thereafter on May 22, 2002, having handed down a Memorandum and Order that Petitioner's Constitutional rights to equal protection of the law and substantive due process were violated when a trial jury was permitted to convict him of the most severely punished of two statutory crimes which under the state's report decisions had become one. The Writ of habeas corpus shall issue unless the prosecution within thirty (30) days resentences Petitioner for Manslaughter in the Second Degree. It is further ordered that the clerk shall file a final judgment to that effect which shall provide that its operation is stayed pending appellate finality, it is,

ORDERED, ADJUDGED AND DECREED: that Petitioner's Constitutional rights to equal protection of the law and substantive due process were violated when a trial jury was

permitted to convict him of the most severely punished of two statutory crimes which under the state's report decisions had become one, and the Writ of habeas corpus shall issue unless the prosecution within thirty (30) days resentences Petitioner for Manslaughter in the Second Degree, and it is further,

ORDERED, ADJUDGED AND DECREED: that the Clerk shall file a final judgment to that effect which shall provide that its operation is stayed pending appellate finality.

Dated: White Plains, N.Y.
June 6, 2002

s/James M. Parkinson
Clerk

U.S. DISTRICT COURT
Filed
JUN 6 2002
W.P.
S.D. OF N.Y.

MICROFILM
JUN 6 2002
USDC SD NY WP

DOCKETED AS
A JUDGMENT
ON JUNE 6, 2002

Appendix D - Judgment of the United States Court of Appeals for the Second Circuit dated July 3, 2002

MANDATE

United States Court of Appeals
For The
Second Circuit

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 13th day of May, two thousand and three.

Before: Hon. James L. Oakes,
Hon. Amalya L. Kearse,
Hon. B.D. Parker, Jr.,
Circuit Judges

Docket No. 02-2382

BRIAN JONES,

Petitioner-Appellee,

v.

JOHN KEANE, SUPERINTENDENT,
WOODBOURNE, CORRECTIONAL FACILITY,

Respondent-Appellant.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

On consideration whereof, it is hereby ORDERED, ADJUDGED and DECREED that the judgment of said District Court is REVERSED and Jones' petition is DISMISSED in accordance with the opinion of this Court.

FOR THE COURT:
ROSEANN B. MACKECHNIE, Clerk
By

s/Arthur M. Heller
Arthur M. Heller
Motions Staff Attorney

A TRUE COPY
ROSEANN B. MACKECHNIE, CLERK

By Yolanda (illegible)
Deputy Clerk
Date:

Issued as Mandate: JUL 3 2003

UNITED STATES COURT OF APPEALS
FILED
MAY 13 2003
Roseann B. Mackechnie, Clerk
SECOND CIRCUIT

No. 03-228

Supreme Court, U.S.
FILED
OCT 27 2003
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

BRIAN JONES,

Petitioner,

—v.—

JOHN KEANE, SUPERINTENDENT,
WOODBOURNE CORRECTIONAL FACILITY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FRANCIS D. PHILLIPS, II
District Attorney
Orange County
Attorney for Respondent
County Government Center
Goshen, New York 10924
(845) 291-2050

RICHARD A. BROWN
District Attorney
Queens County
Of Counsel
125-01 Queens Boulevard
Kew Gardens, New York 11415
(718) 286-5801

ANDREW R. KASS
JOHN M. CASTELLANO*
Assistant District Attorneys
Of Counsel

* *Counsel of Record*

QUESTION PRESENTED

Did petitioner's claim that the prosecution failed to adduce sufficient evidence to support his conviction for murder fairly present to the state courts, for exhaustion purposes, his later claim in a federal habeas corpus proceeding that the New York statutory scheme distinguishing between depraved indifference murder and reckless manslaughter was unconstitutionally vague and violated the Due Process Clause and the Eighth Amendment?

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No. 03-228

In the

SUPREME COURT OF THE UNITED STATES

October Term, 2003

BRIAN JONES,

Petitioner,

-against-

JOHN KEANE, SUPERINTENDENT,
WOODBOURNE CORRECTIONAL FACILITY,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

The State Court Proceedings

On December 20, 1996, petitioner Brian Jones was convicted in New York State County Court, Orange County, of

Depraved Indifference Murder under New York Penal Law §125.25(2), Criminal Possession of a Weapon in the Second Degree under Penal Law §265.02, and Criminal Possession of a Weapon in the Third Degree under Penal Law § 265.03. These convictions arose out of an altercation during which petitioner fired two shots at the victim, Germaine Fields, after a verbal confrontation over a mutual girlfriend.

At trial, petitioner claimed that the victim had threatened to kill him, that he was overcome with fear, and that he did not intend to kill the victim when he fired. At no time prior to or during the trial did petitioner argue, as he later did in federal court, that New York's depraved indifference murder statute was unconstitutionally vague or that the distinction between depraved indifference murder and reckless manslaughter under New York law was so insubstantial as to violate the Equal Protection Clause, the Due Process Clause, or the Eighth Amendment.

On appeal to the New York State Appellate Division, Second Department, petitioner argued solely that the People had failed to prove his guilt at trial beyond a reasonable doubt. *See* Brief for Defendant-Appellant, Appellate Division, Second Department, at 9-10. Reciting the core element of depraved indifference murder under New York law, he argued that the evidence showed that petitioner had not acted "under circumstances evincing a depraved indifference to human life" because when the shots were fired, petitioner was reasonably in fear of the victim, whom he characterized as a "vicious neighborhood bully," and that the victim was responsible for the confrontation. *Id.* Petitioner did not at any point challenge the depraved indifference murder statute as unconstitutionally vague, or the statutory scheme as a violation of the Eighth Amendment, Equal Protection, or substantive Due Process.

Nor did petitioner cite to any cases involving vagueness, the Eighth Amendment, or Equal Protection challenges, or to any provision of the constitution whatsoever. Similarly, petitioner did not argue that there existed no meaningful distinction between the crimes of depraved indifference murder and reckless manslaughter under New York law, or that he was adversely affected in any way by the state's failure to draw an adequate distinction.

The Appellate Division, in affirming the conviction, held that petitioner's guilt of depraved indifference murder was established by legally sufficient evidence and that the verdict was not against the weight of the evidence. *People v Jones*, 266 A.D.2d 236, 696 N.Y.S.2d 902 (2d Dept. 1999). Thereafter, petitioner expressly limited his application seeking leave to appeal to the New York Court of Appeals to the question of legal sufficiency. *See* Letter Application for Leave to Appeal to the Court of Appeals, at 1. He referred to his Appellate Division brief and asserted that "the conviction should be reversed because the People failed to prove beyond a reasonable doubt that Mr. Jones committed depraved indifference murder." The Court of Appeals denied leave on May 24, 2000. *People v Jones*, 95 N.Y.2d 798, 733 N.Y.S.2d 238 (2000).

After his direct appeal, petitioner also moved to vacate judgment and for a writ of error coram nobis in the Appellate Division. Petitioner again did not raise any constitutional challenge to the depraved murder statute in either application.

The Federal Court Proceedings

In March of 2002, petitioner filed a petition for a writ of habeas corpus in United States District Court for the Southern District of New York. Petitioner argued again that the prosecution failed to establish his guilt beyond a reasonable doubt, but this time added separately that the depraved indifference murder statute was unconstitutionally vague, and violated the Eighth Amendment and the Due Process Clause, owing to "confused and contradictory" interpretations by the New York Court of Appeals. *See* Habeas Corpus Petition, No. 02-CV-1804, filed in United States District Court, Point One.

According to petitioner, under New York Court of Appeals precedent, there existed no meaningful distinction between depraved indifference murder and reckless manslaughter. The crux of the problem, according to petitioner, was that the Court of Appeals, in a long line of decisions beginning with *People v. Register*, 60 N.Y.2d 270 (1983), 469 N.Y.S.2d 599, *cert. denied*, 466 U.S. 953 (1984), had eliminated the common law requirement of depraved indifference murder that the actor possess a state of mind reflecting "a wickedness akin to that of one whose conscious objective is to kill." Pet. Point One, unnumbered page (quoting *Register*, 60 N.Y.2d at 286). Without this element, the only distinction under New York law between depraved indifference murder and reckless manslaughter, according to petitioner, was that the former required a "very substantial risk" of death and the latter a "substantial risk." This distinction, the argument proceeded, was so insubstantial as to render the depraved indifference murder statute unconstitutionally vague because it allowed prosecutors and judges to arbitrarily prosecute some people for the more serious crimes and others for the lesser

crimes. *Id.*; *see Kolender v. Lawson*, 461 U.S. 352, 358 (1983) ("Where the legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'" (quoting *Smith v. Goguen*, 415 U.S. 566, 575, 39 L. Ed. 2d 605, 94 S. Ct. 1242 [1974]).

The state responded that petitioner had failed to present his constitutional challenge to the state courts on direct appeal, as required by exhaustion principles, and that, because he no longer had any claim available in state court, this contention was procedurally barred from review in federal court. *See* Memorandum of Law in Opposition to Petition, Point One. The state also argued that state law adequately distinguished between the two crimes and that petitioner had failed to establish any constitutional violation in the state's statutory scheme.

The District Court granted the petition. The court acknowledged that petitioner had not presented his constitutional challenge to the New York state courts, but held that petitioner's state court argument that the evidence was insufficient to support his guilt satisfied the exhaustion requirement because it was "inextricably intertwined" with the federal constitutional claim (11a).[1] The court also concluded that sending petitioner back to state court would be futile because the Court of Appeals had decided that a distinction did exist between the two statutes, over the strenuous dissents of Judges Jasen and Bellacosa in *People v. Register* and

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[1]While petitioner's appendix to his petition reproduces portions of the District Court order, it has omitted almost the entire discussion of the exhaustion issue and some discussion of the merits. The full opinion is reproduced in the Appendix to this Brief in Opposition.

subsequent decisions, and that "if they [the state courts] won't listen to Judge Bellacosa and they won't listen to Judge Jasen, then they won't listen to Brian Jones" (Pet. App. at 10a).

On the merits, the court concluded that the New York Court of Appeals had eliminated any meaningful difference between depraved indifference murder and reckless manslaughter, reducing the distinction to the difference between a "substantial risk" of death and a "very substantial risk" of death. The court concluded that a trial jury could not "slice the salami that fine," and, without citing any authority, determined that the failure to distinguish between the two crimes violated both the Equal Protection Clause and substantive Due Process (10a).

The state appealed to the Second Circuit Court of Appeals, arguing that the District Court erred in concluding that petitioner's legal-sufficiency claim in state court fairly presented his later constitutional challenge to the statutory scheme. *See* Respondent's Brief to Second Circuit Court of Appeals at 16-28. The state argued that, in his legal sufficiency claim, petitioner had presented only the issue of whether the jury had properly rejected his claim of self-defense, and he had not alleged that the elements of the crime were vague or challenged the constitutionality of New York's depraved indifference murder statute or the distinction between that statute and the reckless manslaughter statute. Because petitioner had failed to exhaust the claim, and because he could no longer return to state court to do so, his claim was procedurally barred from review. The state also argued that the New York Court of Appeals had provided more of a distinction between the two statutes than the District Court recognized, and that the distinction was sufficient to pass this Court's Equal Protection and Due Process tests. *Id.* at 32-57.

The Second Circuit reversed the District Court decision, holding that petitioner had failed to present his constitutional challenge to the depraved indifference murder statute to the state courts. *Jones v. Keane*, 329 F.3d 290 (2003). The court noted that, to satisfy the exhaustion requirement, the claim presented to the state courts must be the "substantial equivalent" of the claim presented in federal court. *See Picard v. Connor*, 404 U.S. 270, 278 (1971). The court then noted that, in state court, petitioner did not challenge the statute or raise any dispute as to what constituted the elements of the crime, but argued only that the evidence presented in his case did not meet the established definition of the crime. 329 F.3d at 295-96. The court further noted that in his appellate brief, petitioner recited the elements of the crime without indicating any concern that they were unconstitutionally vague. *Id.* Petitioner therefore had failed to raise his constitutional challenge to the crime of depraved indifference murder in state court, and consequently failed to satisfy the exhaustion requirement. *Id.* Because petitioner could no longer return to state court to raise his constitutional challenge, and because petitioner had not attempted to establish cause and prejudice or a miscarriage of justice, his claim was barred in federal court. *Id.* at 296.

Petitioner subsequently sought a writ of certiorari in this Court. For the reasons stated below, further review of this issue is unwarranted.

REASONS FOR DENYING THE WRIT

In this Court, petitioner seeks review of his contention that his state court claim that the prosecution failed to prove his guilt of depraved indifference murder at trial fairly presented his later federal claim that the state law defining the offense and

distinguishing it from reckless manslaughter was unconstitutionally vague and violated the Due Process and Equal Protection Clauses of the Constitution. But, in seeking certiorari, petitioner presents this Court with no split of authority between federal circuit courts or between a state court of last resort and a federal circuit court on a similar issue, and does not contend that the Second Circuit failed to apply the correct legal standard or rule of law as set forth in any decision of this Court. Indeed, in his argument in support of review here, petitioner agrees with the standard applied by the Second Circuit – that the state claim must be the "substantial equivalent" of the federal claim – but contends merely that the lower court misapplied this standard to the specific facts of this case. Because this question does not present a legal question of importance or an issue likely to recur with great frequency, it does not merit this Court's review.

Moreover, as explained below, the Second Circuit correctly applied the law to petitioner's case: his state court claim that the proof at trial was insufficient failed to raise a constitutional challenge to the way in which New York defines the crime of depraved indifference murder or distinguishes it from any other offense. Indeed, the constitutional claim was fundamentally different from, and far broader in consequences than, the claim he raised in state court. And this is true both from a procedural and substantive standpoint. Thus, the Second Circuit decision does not require further review.

A. Petitioner's Claim Presents No Substantial Legal Question Meriting this Court's Review, But, Rather, Argues a Misapplication of the Agreed-Upon Legal Standard to the Peculiar Facts of this Case.

In seeking review, petitioner fails to raise a substantial question over the legal standard or rule of law to be applied in his case. Indeed, he agrees with the Second Circuit and respondent on the test to be applied, arguing only that, under the particular facts of his case, his state court filing was sufficiently similar to his federal filing to warrant a different conclusion than that adopted by the Second Circuit. The failure to contest the legal standard to be applied and petitioner's heavy reliance on the specific facts of his case, which are relatively peculiar and not of widespread applicability, render his petition unworthy of review here.

In his petition, petitioner acknowledges that he was required by this Court's precedent to exhaust his state court remedies before attempting to raise in a habeas corpus petition his constitutional challenge to the state's definition of depraved indifference murder and reckless manslaughter. Pet. at 18. He also acknowledges that this required him to "fairly present" his claim to the state courts and that he could only do this by arguing there the "substantial equivalent" of the claim later raised in his habeas petition. Pet. at 18-19. Indeed, he specifically adopts the "substantial equivalent" standard as the applicable test and argues that he met it. Pet. at 19. ("Petitioner's insufficiency-of-the-evidence claim was the 'substantial equivalent' of his federal constitutional claim to the state courts."). Moreover, petitioner does not contend that the Second Circuit applied a different standard, as indeed it did not. *Jones v. Keane*, 329 F.3d at 294-95. ("The claim presented to

the state court . . . must be the "substantial equivalent" of the claim raised in the federal habeas petition").

Petitioner, then, does not argue that the Second Circuit used or created an erroneous legal standard or test, or that it adopted a rule of law in conflict with any decision of this Court or any other federal circuit court. He argues merely that the Second Circuit misapplied the agreed-upon test to the particular facts of his case. He argues, in essence, that his argument as it appeared in his brief to the New York State Appellate Division was sufficiently similar to argument he made in his federal habeas petition to satisfy the standard that he acknowledges applies to him. This fails to present an issue worthy of review in this Court.

Indeed, as this Court's rules make clear for all petitioners, "a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." Supreme Court Rule 10. This is because such arguments do little more than present "fact-bound issue[s] of little importance since similar situations are unlikely to arise with any regularity." *Massachusetts v. Sheppard*, 468 U.S. 981, 988 n.5 (1984). This is precisely the type of limited fact-bound claim petitioner wishes to raise here.

Nor is the factual scenario in this case so common that a ruling on it might prove useful in a great many other cases or might even merit its own, more specific, legal standard or rule. Unlike, for example, the currently pending case of *Baldwin v. Reese*, No. 02-964, which concerns an all-too-common claim of ineffective counsel – a claim that is almost invariably raised in similar terms in both state and federal court – this case raises a relatively rare claim. Indeed, while ineffectiveness claims of one

form or another appear in almost every habeas petition, it is unlikely that petitioner's factual scenario, in which he has attempted to convert a mere legal sufficiency claim into a federal constitutional challenge to the entire statutory scheme at issue, will frequently recur. Petitioner's claim, therefore, does not promise the same widespread applicability that *Baldwin* does.

Moreover, the *Baldwin* case presents a legal issue not present here: whether a petitioner who makes the identical allegations in state and federal court must invoke the federal constitution in state court to obtain review in federal court. Indeed, the habeas petitioner in *Baldwin* presented the identical allegations of ineffectiveness in both courts, and the issue presented in this Court revolves around whether the state court was alerted to the federal constitutional nature of the claim. *See* Brief for Petitioner, *Baldwin v. Reese*, No. 02-964 at i. Here, by contrast, petitioner did not make the same underlying allegations in state and federal court. While he alleged in state court that the evidence was insufficient to prove his guilt, he argued in his habeas petition that the entire statutory scheme was constitutionally invalid. In other words, while the issue in *Baldwin* concerns whether the habeas petitioner invoked the federal constitution in state court to resolve the identical allegations, the issue here is whether the underlying allegations are the same at all. Thus, whatever the outcome of the far more subtle issue in *Baldwin*, here, as petitioner recognizes, the appropriate test is the "substantial equivalent" test, a test which, as explained below, petitioner clearly fails. Because petitioner has not challenged the test applicable to his case, and because both the issue and the facts in *Baldwin* are so different from this case, *Baldwin* would ultimately shed little light on this matter.

In short, petitioner has raised no substantial legal issue in this Court, but only asserts a misapplication of accepted law to the facts of his case. This limited issue is simply not of sufficient significance to warrant this Court's review.

B. The Second Circuit Correctly Applied the Law to the Facts of Petitioner's Case.

Petitioner is also incorrect in arguing the limited issue that he presents for this Court's review. Contrary to petitioner's position, the Second Circuit correctly decided that his state court claim that the prosecution failed to adduce sufficient evidence of his guilt was not the "substantial equivalent" of his constitutional challenge to the way in which New York defines the crime of depraved indifference murder and distinguishes it from reckless manslaughter. At a minimum, the claims are different because the proof-of-guilt claim requires only an evaluation of the evidence in his case while the constitutional challenge requires an analysis of the scope of the statutory scheme as a whole, as well as an analysis of the constitutional requirements for, and limitations on, the power of the states to define crimes under state law. Thus, the former claim simply does not implicate the latter. For this reason, the Second Circuit decision did not unfairly preclude review of petitioner's federal claim and does not require the intervention of this Court.

In order to determine whether petitioner presented the same claim in state and federal court, it is necessary to review his filings in each court. In state court, petitioner acknowledged that the statute required that the state establish that he acted under circumstances evincing a depraved indifference to human life, and argued that, the state had failed to do so because the evidence showed only that he was a young man who had acted out of fear and immaturity. Even then, petitioner primarily

argued that the jury had wrongly rejected his claims of self-defense, and as such, the verdict was against the weight of the evidence, a state law claim. *See* C.P.L. § 470.15(5). In federal court, petitioner attacked the constitutionality of the definition of the crime of depraved indifference murder and the state scheme distinguishing that crime from reckless manslaughter. He argued that through a gradual erosion over a period of years and through numerous decisions, the Court of Appeals had eliminated the common law element of the crime that requires that the actor possess a state of mind reflecting a "wickedness akin to that of one whose conscious objective is to kill." Habeas Corpus Pet. Point One, unnumbered (quoting *People v. Register*, 60 N.Y.2d at 286); *see also Jones v. Keane*, 329 F.3d at 293. According to petitioner, the only distinction between the crime of depraved indifference murder and reckless manslaughter was that the greater crime required a "very substantial risk" of death and the lesser only a "substantial risk." Petitioner then argued that the Constitution requires that states provide a more meaningful distinction than this in defining crimes. The "failure of the [depraved indifference] statute to adequately define the more serious mens rea" creates the constitutionally unacceptable risk, according to petitioner, that "prosecutors and juries [will] arbitrarily and erratically determine which crime to prosecute or to apply." Appellee's Brief to Second Circuit (citing *Kolender v. Lawson*, 461 U.S. 352, 358 [1983]). As a result, the state scheme distinguishing between non-intentional murders violated the Due Process Clause, the Eighth Amendment, and, as the District Court found, the Equal Protection Clause.

Under these facts, petitioner's state court claim was not the substantial equivalent of his federal constitutional claim. In his state court claim, petitioner accepted the state definition of depraved indifference murder. He made no attempt to challenge

the definition, or to point out that the state had improperly eliminated an essential element of the common law crime, or to compare the elements of depraved indifference murder with those of reckless manslaughter. Even more significantly, petitioner did not identify, much less attempt to apply, any constitutional requirements that might limit the way in which states may define and distinguish among crimes. There would, then, have been no reason for the state court to have questioned the prevailing definition of the crime of depraved indifference murder or to have examined the constitutional limitations involved. By contrast, in federal court, petitioner attacked the definition of the crime as constitutionally erroneous, argued that the state could not eliminate a common law element of the crime, and insisted that the two statutes were indistinguishable and that the Eighth Amendment and Due Process Clause forbid such an event.

In the end, the very nature of the complaint was altered on a fundamental level. The essence of the federal claim was that *no one* could properly be convicted under the statute because it is arbitrary and discretionless. In state court, petitioner accepted the definition of the statute and merely alleged that *he personally* was not properly convicted based on the proof adduced at his trial.

Furthermore, had the constitutional challenge to the depraved murder statute been raised, the state would have had meaningful defenses to it under the facts of this case that it never had the opportunity to raise. For example, the state could have raised two dispositive procedural arguments that would have precluded review in state court and acted as independent and adequate state grounds barring review in federal court. *See Wainwright v. Sykes*, 433 U.S. 72 (1977). Had the issue been raised, the state would have argued that petitioner had failed to

preserve the issue for review because he never raised it in the trial court through an appropriate pre-trial motion. *See, e.g., People v. Davidson*, 98 N.Y.2d 738, 751 N.Y.S.2d 161 (2002)(constitutional challenge to statute unpreserved because not specifically raised as such in the trial court); *People v. Voliton*, 83 N.Y.2d 192, 195-96, 608 N.Y.S.2d 945 (1994)(same). The state would also have noted that state law requires that any litigant challenging the constitutionality of a state statute notify the Attorney General, so that he may take appropriate action and intervene if warranted, C.P.L.R. 1012[b]; Executive Law §71, and in the absence of such notice, the constitutional challenge is not reviewable. *See McGee v. Korman*, 70 N.Y.2d 225, 231-32, 519 N.Y.S.2d 350 (1989); *Matter of Rivera v Cassas*, 275 A.D.2d 417, 713 N.Y.S.2d 689 (2d Dept. 2000). Additionally, because the claim was not raised in the trial court it was unpreserved and could not be properly included for the first time in his application for leave to appeal to the New York Court of Appeals. 22 N.Y.C.R.R. § 500.10(a); *see People v. Davidson, supra*. But the state had no opportunity to advance these arguments because the constitutional challenge to the statute was never raised in state court. Similarly, because petitioner expressly limited his leave application to the New York Court of Appeals to the issue of legal sufficiency, his constitutional challenges were not exhausted for this additional reason. *See O'Sullivan v. Boerckel*, 526 U.S. 838 (1999). For these reasons, and because these procedural bars would have precluded review in federal court, petitioner's state law claim cannot be deemed to have fairly presented his constitutional challenge to the state courts.

In short, petitioner failed to present to the state court not only the essential underpinnings of his legal challenge, but also the very nature of it: that the state had unconstitutionally defined the crime of depraved indifference murder. Because the state

court was not alerted to that issue and did not consider it, and because the state could have raised other defenses to such a challenge, the Second Circuit was correct in finding that petitioner had failed to present his federal habeas claim to the state courts.

Petitioner nevertheless argues that his sufficiency-of-the-evidence claim properly presented his constitutional challenge to the state statutory scheme for review in the state courts. He argues that his legal-sufficiency claim was adequate to raise a constitutional due process issue because state law adopts the standard of *Jackson v. Virginia*, 443 U.S. 307 (1979), for legal-sufficiency claims, and that, state convictions that do not comply with that standard violate the Due Process Clause. Pet. at 19-20. He also points out that in order to decide the legal sufficiency issue, the state was required to distinguish between depraved indifference murder and reckless manslaughter. Pet. at 20. Neither of his arguments establishes, however, that the state court claim was the equivalent of the federal one.

As to the first argument, petitioner mistakenly assumes that all Due Process claims are the same. He argues essentially that because one Due Process claim may have been raised in state court, any other claim he could construct that might fall within the Due Process Clause could also be raised. This cannot be true. As this case forcefully demonstrates, the Due Process Clause encompasses a vast range of claims, spanning every form of procedural and substantive Due Process that this Court has enunciated over many decades. State courts faced with one Due Process claim do not, and could not, consider every other possible claim that could be deemed to invoke the Due Process Clause. Thus, the fact that the Due Process Clause has been invoked to raise one claim does not mean that every other claim

that may invoke the Due Process Clause is its substantial equivalent.

As to the second argument, while the state court had to understand the difference between depraved indifference murder and reckless manslaughter under state law in order to decide if the proof of guilt was sufficient, it did not have to consider whether the state's distinction between the two crimes was constitutionally adequate. Indeed, the state court undoubtedly believed that it understood the state law definition of depraved indifference murder and how it differed from reckless manslaughter, but, in the absence of a challenge to the constitutionality of the distinction, it had no occasion to investigate whether that distinction was sufficient to pass muster under the Due Process and Equal Protection Clauses. In the absence of a constitutional challenge to the statute, the court needed merely to accept the distinction as stated in the state statute and caselaw; it was not required to question whether the state had the right, under the constitution, to define the distinction the way it did.

Thus, while both claims touch upon the distinction between the two crimes, that is where their similarity ends. For the legal-sufficiency claim, the legal analysis consists of recognizing and accepting the distinction, and applying it to the proof at trial. The constitutional claim, by contrast, requires not only recognizing the distinction, but examining the very power of the state to define the crime the way it did. The state court here, presented with solely a legal-sufficiency claim, simply had no occasion to consider the much more complex and different constitutional issues.

Petitioner also argues, however, that he did no more between state and federal court than "re-formulate" his claim

and add a new legal theory to support the same result. Pet. at 20-21. According to petitioner, his "argument concerning the unconstitutionality of the statutory scheme is simply additional legal support to his insufficiency/due process argument and not a separate independent challenge." Pet. at 21. But petitioner did much more than add legal support to his claim. He changed the claim at its foundation, altering his initial argument – that the proof in his case was inadequate because it showed that he acted out of a reasonable fear for the victim – to one that attacked the statute as a whole and argued, as a matter of constitutional law, that no one could properly be convicted under the state statutory scheme. Moreover, the only way in which both claims can be seen to support the same conclusion at all is that they were both advanced in support of reversal. This alone cannot be enough to establish that petitioner merely altered his "legal theory." Many different grounds may be advanced in support of reversal, but they are not all merely different legal theories that raise variations of the same claim. Thus, this argument too is insufficient to establish that petitioner raised the same claim in state and federal court.

The lack of merit in petitioner's current arguments in favor of exhaustion is further demonstrated by this Court's decision in *Anderson v. Harless*, 459 U.S. 4 (1982) (per curiam). In that case, the petitioner argued in state court that the trial court's instruction on malice was erroneous, and relied on a state case that asserted a broad due process right to instructions that properly explain the law. *Id.* at 6-7. In federal court, petitioner argued that the malice instruction violated due process because it unconstitutionally shifted the burden of proof on this critical issue. *Id.* Even though the precise same instruction was involved on state and federal review and even though the state caselaw the petitioner relied upon and the federal claim both invoked due process, this Court held that the

claims were not the same for exhaustion purposes. *Id.* Similarly here, while both claims arguably involved the distinction between the two statutes and even invoked the Due Process Clause, the claims were otherwise wholly different. Thus, the federal-court claim here, like the one in *Harless*, was not merely "re-formulated," it was fundamentally different.

In sum, the Second Circuit correctly determined that petitioner's state brief had not presented the same claim as the constitutional claim he made in federal court. While both claims arguably invoked due process in some sense and required some understanding of depraved indifference murder under New York law, this alone was insufficient to establish that these two fundamentally different claims were one and the same. Moreover, because petitioner has not challenged the legal standard used by the Second Circuit, this case presents no substantial legal issue for this Court's review.

CONCLUSION

The issue raised by petitioner presents no legal question of importance for this Court's review, but raises at most a question of misapplication of an agreed-upon standard to the unusual facts of this case. For this reason, and because the Second Circuit's conclusion was ultimately correct and eminently fair, a writ of certiorari should be denied.

Respectfully submitted,

FRANCIS D. PHILLIPS, II
District Attorney
Orange County
Attorney for Respondent
County Government Center
Goshen, New York 10924
(845) 291-2050

RICHARD A. BROWN
District Attorney
Queens County
Of Counsel
125-01 Queens Boulevard
Kew Gardens, New York 11415
(718) 286-5801

By: ANDREW R. KASS
JOHN M. CASTELLANO*
Assistant District Attorneys
Of Counsel

* *Counsel of Record*

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

BRIAN JONES,

Petitioner,

02-Civ-1804 (CLB)

-against-

MEMORANDUM OF LAW

JOHN KEANE, Superintendent, etc.,

Respondent.

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Brieant, J.

By his counseled petition docketed March 6th, 2002, Mr. Brian Jones, a state prisoner seeks a writ of habeas corpus pursuant to 28 U.S.C. Section 2254. The following sets forth the findings of fact and conclusions of law of this Court, based solely upon the official record. The petition is timely and, as noted below, all claims have been subject to exhaustion, although the latter points is in dispute.

After a jury trial conducted before County Judge Patsalos of Orange County, Petitioner was convicted of murder in the 2nd degree, (depraved indifference murder) under Section 125.25(2) of the New York Penal Law and also of related weapons offenses in connection with the murder. The jury acquitted him of intentional murder under Section 125.25(1).

On the evening of June 17, 1996, at 11:00 p.m. in the City of Newburgh, Orange County, New York, the Petitioner fired two shots which killed Germaine Fields, an eighteen year old male who had engaged in a street fight with Petitioner and others. Ms. Fields died. Mr. Jones fled but was arrested the following morning.

On December 20, 1996, the Court sentenced Petitioner on three different counts, the longest of which is nine years to life. The conviction was affirmed on direct appeal (*People v. Jones* 266 AD 2d 636) and leave to appeal was denied by the New York Court of Appeals on May 24, 2000 (*People v. Jones* 95 NY 2d 798). Thereafter, the Petitioner commenced a *coram nobis* proceeding in the Appellate Division claiming for the first time that he had been denied effective assistance of Appellate Counsel. He also moved in the County Court under New York CPL § 440.10, to vacate the judgment because of ineffective assistance by trial counsel. Both of these applications were denied, and leave to appeal from the denial of the Section 440.10 motion was denied by the Appellate Division on February 20th, 2002.

The Jury Challenges

The Petition alleges as a separate ground for relief that the Petitioner's trial attorney was ineffective because he failed to exhaust Petitioner's peremptory challenges and the appellate attorney was ineffective in failing on direct appeal to raise the jury selection issue. A juror, Shirley Grammas, was challenged for cause by defense counsel after she had told the Court that she hoped she would not be selected, and that she had diabetes and high blood pressure and feared that her sugar level and blood pressure might increase if she were involved in a verbal disagreement with other jurors, and that if she became

emotionally upset, she might not be able to serve. There was no indication of bias, or that Ms. Grammas could not give a fair and impartial verdict.

Although the prosecutor did not oppose this challenge for cause, it was denied by the trial judge at a time when defense counsel had one peremptory strike remaining. The ineffective assistance is said to arise from the fact that Counsel did not peremptory strike Juror Grammas who became the twelfth member of the panel. The next prospective juror was sworn in as the first alternate without any challenge from Defense Counsel. This point is mentioned by Petitioner as supporting an inference that the Trial Court did not fail to exercise his last peremptory because he was concerned over the suitability of the next prospective juror.

No issue involving jury selection was raised by Appellate Counsel and, indeed, Appellate Counsel was not in possession of the transcript of the proceedings during which the jury was selected. The real point is that the trial judge had arguably denied improperly two previous challenges for cause, thereby forcing defense counsel to use two peremptories. In order to preserve these arguably erroneous rulings for appellate review, counsel had to exhaust all his peremptory challenges. This he did not do.

This issue is without merit. To prevail on such an issue, Petitioner must show cause and prejudice. There is no prejudice. The two prior challenged jurors did not serve, and there is no reason to find bias on the part of Ms. Gammas, who simply did not want to serve in a contested trial because of concern over her medical condition, tainted the verdict in any way.

The Incident

Viewed most favorably to the Prosecution, the trial record shows that Petitioner, age 15 at the time of the event, was engaged in a sexual relationship with Latoya Williams, another minor, who was expecting Petitioner's child. Two or three days prior to the event, Miss Williams had informed Petitioner that Germaine Fields had expressed an intention to stab Petitioner in the stomach. Petitioner had accused Fields of "coming on" to his girlfriend. Fields, a recent arrival in the community and purportedly a member of the Crips street gang, denied doing so.

On the evening of June 17, 1996, at about 11:00 P.M., in the street, three or four doors from Miss Latoya Williams home, she and Petitioner was in conversation, when Fields appeared out of the darkness and began cursing the Petitioner. Latoya's father, John Smith, entered the discussion. The confrontation escalated and ultimately Miss Williams and Fields became entangled in a struggle and both fell to the sidewalk with Latoya on top, being held by Fields. Petitioner shot Fields twice, from a distance of two feet pointing the gun downward at him while he was lying on the sidewalk on his back.

A large number of witnesses testified to having observed all or part of the crime. There was no credible evidence that the deceased was armed, although Petitioner testified he thought this to be the fact. It was clear that a violent fight was in progress immediately prior to the shooting, in which Fields was the aggressor. Both bullets struck Mr. Fields in the neck. He arrived at the emergency room of St. Luke's Hospital without a pulse and not breathing and died either on or directly prior to arrival. On the early morning of June 18th, 1996, Petitioner was arrested at a motel in Poughkeepsie, registered under a false name.

The Challenge to the Statute

Petitioner testified in his own defense that he had been threatened by Fields and told to leave the scene or he would get killed. He said that he thought Fields had a gun and was reaching for an object in his pocket which appeared to be a weapon, while Fields was on the ground holding on to Latoya Williams. As soon as Fields' had entered his pocket, Petitioner fired. Petitioner asserted that he was afraid Fields was going to kill him and was concerned that Latoya had been hurt by Fields. He claimed that at the time he fled he did not know whether Fields had been hit by either bullet. Petitioner testified that he was not trying to kill Fields but was just trying to hurt him. The jury is deemed to have rejected the contention of Petitioner that this intentional shooting was in self defense.

After all the evidence had been received, the defense asked the Trial Judge to charge the lesser included offense of criminally negligent homicide, New York Penal Law § 125.15, but this application was denied. As noted earlier, Mr. Jones was acquitted of intentional murder but found guilty of depraved indifference murder and the two weapons counts.

Sub-paragraph 2 of Section 125-25 of the New York Penal Law under which Petitioner was convicted defines an alternate version of murder in the second degree when "under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person." In contrast, Section 125.15 of the Penal Law which defines manslaughter in the second degree, reads in relevant part, as follows:

"A person is guilty of manslaughter in the second degree when:

1. He recklessly causes the death of another person."

Petitioner argues as his second claim, that as a matter of constitutional law, there is no statutory distinction between reckless manslaughter, and depraved indifference murder, and that the statutory definition of depraved indifference murder is unconstitutionally vague.

Certainly this is not true on the face of the statutes and Petitioner apparently does not so contend. A persistent series of judicial glosses placed on the statutory use of "depraved indifference murder," by New York's highest court seems to have, in effect, removed any distinction between the two crimes. This, it is contended, thereby violates the constitutional rights of persons convicted under the more serious of the two offenses.

There is a statutory definition of recklessness found in Penal Law Section 15.05. A person acts recklessly "when he is aware of and consciously disregards a substantial and unjustifiable risk that [a result described by a statute defining an offense] will occur or that such circumstances exist." "The risk must be of such a nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation."

There are a number of reported cases in the New York courts at all levels holding that the statutory reference to depraved indifference murder is not so vague as to violate substantive due process or equal protection rights of defendants. The words do possess a clear meaning in the general speech of the people and standing alone should be sufficient to give

adequate warning to a non-lawyer member of the public as to what conduct is rendered unlawfully by the statute. Classic textbook definitions about: throwing the classic squib into the market place is depraved indifference. The New York Court of Appeals held in *People v. Jernatowski* 238 NY 188 (1924) that firing two or more shots from the street into a house where the Defendant knew that human beings were present, and killing one of the occupants constituted depraved indifference murder. In *People v. Poplis* 30 NY 2d 85, 87 (1972), the New York Court of Appeals upheld the statute in a situation where "repeated brutal, callous and inhuman beatings" inflicted on a small child over several days resulted in injuries producing death.

Later, in *People v. Register* 60 NY 2d 270 (1983), cert. den. 466 US 953 (1984), the New York Court of Appeals considered a factual situation where the Defendant, intending to shoot one Mitchell, shot and killed another person. This case concerned primarily the issue of voluntary intoxication as bearing on intent, and arose in the context of a shooting incident in the early morning in a crowded saloon. The Court in *Register* held that the statutory phrase "under circumstances evincing a depraved indifference to human life" referred only to the factual setting in which a crime occurs and contrasted the case with manslaughter in the second degree by holding that the "statute requires in addition not only that the conduct which results in death present a grave risk of death, but that it also occur under circumstances evincing a depraved indifference to human life". The Court held "this additional requirement refers to neither the ***mens rea*** or the ***actus reus***. If it states an element of the crime at all, it is not an element in the traditional sense but rather a definition of the factual setting in which the risk creating conduct must occur - objective circumstances which are not subject to being negatived by evidence of Defendant's intoxication." The Court also held that in a "depraved mind

murder the actor's conduct must present a grave risk of death whereas in manslaughter it presents the lesser substantial risk of death (*Register*, 60 NY 2d 276). It went on to hold that the phrase refers to the "wantonness of Defendant's conduct and converts the *substantial* risk present in manslaughter to a *very substantial* risk present in murder (Id at p. 276-277). This seems to be a largely circular definition worthy of the committee that wrote the International Revenue Code, and tell us not very much. The dissenting opinion of Judge Jasen observed, and this Court agrees that the *Register* opinion "effectively eviscerated the distinction between manslaughter in the second degree, Penal Law Section 125.15(1) and murder in the second degree, Penal Law Section 125.25(2) with respect to the accused's state of mind", *Register* 60 NY 2d 282.

Later in *People v. Roe* 74 NY 2d 20 (1989), arising out of a killing resulting from Russian roulette (described by the perpetrator as Polish roulette), a majority of the Court, following *Register*, held that depraved indifference murder differs from manslaughter only in that the actor's reckless conduct must be imminently dangerous and present a grave risk of death, while in manslaughter, the conduct need only present a less substantial risk of death. This constitutes another play on words substantially similar to the definition imposed by the Court in *Register* and evoked a dissent by Judge Bellacosa, in which he observed that the majority "finalizes the obliteration of the classical demarcation between murder and manslaughter in this state" *Roe* 74 NY 2d at 29.

Later cases which continued this anomalous construction placed on the statute initially in the *Register* case include *People v. Cole* 85 NY 2d 990 (1995) and *People v. Johnson* 87 NY 2d 357 (1996). In the latter case, the Court of Appeals held that

the language was not unconstitutionally vague, because conduct with depraved indifference to human life is well understood.

This Court agrees that the concept of depraved indifference to human life is well understood, and is essentially self-defining notwithstanding the confusing glosses placed on the statute by *Register* and its progeny. But when two different statutes are construed by New York's highest Court to reach the same conduct, or indistinguishable conduct, and one carries a far lesser penalty, allowing a grand jury to choose to indict for either one is clear denial of equal protection.

More likely, once the jury concluded that self defense was not involved, this case really became one of intentional homicide.[1] The opportunity to submit what is at least by appearance a lesser included offense to intentional murder to the jury, as was done in this case, allows hesitant compromises to reach a verdict under conditions such as in this case, where they were apparently reluctant to convict Mr. Jones of intentional murder. There is nothing in our constitutional jurisprudence to prevent this.

Clearly it cannot be said that the statute is vague as applied in the case of a person who deliberately pumps two shots into the neck of someone who is lying on the ground at a distance of two feet. It is ordinarily thought that one who has received from a statute fair warning of the criminality of his own conduct, is not entitled to attack it because the language would not give similarly fair warning with respect to other conduct which might be within its broad and literal ambit. *Parker v. Levy* 417 US

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[1]While New York law requires a person asserting self-defense to "retreat to the wall", in practice juries tend to apply the standards of the OK Corral when the facts show a killing really was committed in self-defense.

733, 756 (1973); *United States v. Rybicki* 287 F.3d 257, 263 (2d Cir. 2002).

In most cases, where a penal statute is found unconstitutionally vague as applied, the result is that the accused goes free. This is not such a case, because the conduct of which Mr. Jones was convicted, as apparently viewed by the jury, would have resulted in a conviction for the lesser crime of reckless manslaughter. That the New York Court of Appeals has conflated the two statutory crimes is a matter of consideration concern to this Court. That the New York caselaw has merged this offense with the less serious available charge of manslaughter 2d, raises a serious issue of equal protection, and a strong possibility of prosecutorial discrimination against minorities or unpopular defendants. This Court concludes that the conviction for depraved indifference murder as applied to the facts of the case as the jury must have found them violated Petitioner's Constitutional right to the equal protection of the laws, as well as substantive due process. There was no rational basis by which a grand jury could chose to indict in this case for depraved indifference murder as opposed to reckless manslaughter, and the trial jury was denied the opportunity to choose between two identical crimes, one of which carries a far lesser penalty. A rational jury could not be expected to differentiate between a "grave risk of death" and a "substantial risk of death", as required by the New York Court of Appeals. This is a distinction without a difference; a trial jury simply cannot slice the salami that fine, as Judge Bellacosa and Jasen in dissent have pointed out for all to see.

Exhaustion

This Court has left the disputed issue of exhaustion for the last, because the adequacy of exhaustion is best tested by considering that which is to be exhausted.

Petitioner argues, and this Court agrees, that in the context of this case, raising in the state court the issue of insufficiency of the evidence was sufficient to raise "inextricably intertwined with") a challenge to the statutory criteria for distinguishing reckless manslaughter from depraved indifference murder.

The requirement for exhaustion is not intended to exhaust the petitioner or his or her lawyers, but is designed to give the state courts the opportunity to address and correct violations of Constitutional rights. That purpose is fulfilled when the state court has a fair and meaningful chance to grant relief on what is substantially the same claim raised in federal court. *O'Sullivan Boerckle* 526 U.S. 838, 844 (1999) *Vasquez v. Hillary* 474 U.S. 254, 257 (1986). In the context of this case, if they won't listen to Judge Bellacosa and they won't listen to Judge Jasen, they won't listen to Brian Jones, and no purpose will be served in staying this case for further exhaustion of state remedies.

Conclusion

Petitioner's Constitutional rights to equal protection of the law and substantive due process were violated when a trial jury was permitted to convict him of the most severely punished of two statutory crimes which under the state's reported decisions had become one. The Writ shall issue unless the prosecution within thirty (30) days resentences Petitioner for Manslaughter in the Second Degree. The Clerk shall file a final judgment to that effect which shall provide that its operation is stayed pending appellate finality.

SO ORDERED.

Dated: White Plains, NY
May 22, 2002

Charles L. Brieant, U.S.D.J.